
SUPPLEMENT

PAUL

CARRIE

CARRIE

ATTACHED

(27,981)

(28,010)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 624.

PAUL A. EWERT, APPELLANT,

vs.

CARRIE BLUEJACKET, A WIDOW, ET AL.

FILED NOVEMBER 29, 1920.

No. 653.

CARRIE BLUEJACKET, A WIDOW, ET AL., APPELLANTS,

vs.

PAUL A. EWERT.

FILED DECEMBER 18, 1920.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

INDEX.

	Original.	Print.
Application to transcript from U. S. circuit court of appeals.....	a	a
Attestation and acknowledgment of service.....	1	1
Petition	2	2
Exhibit A—Certified copy of patent to Charles Bluejacket, September 6, 1896.....	9	9
Exhibit B—Deed, Carrie Bluejacket <i>et al.</i> to Paul A. Ewert, April 8, 1909.....	11	11
Answer	14	14
Letter, Charles J. Bonaparte, Attorney General, to Paul A. Ewert, October 23, 1908.....	26	26

	Original	Page
Exhibit A—Deed, Carrie Bluejacket <i>et al.</i> to Paul A. Ewert, April 8, 1909.....	35	2
Exhibit B—Amended rules of Department of Interior for conveyance of inherited Indian lands.....	39	3
Order, March 15, 1917, submitting cause.....	46	4
Plaintiffs' motion to set aside submission of cause.....	47	5
Affidavit of Franklin M. Smith, grantee, filed with the application to have the Redeagle deed approved.....	49	6
Letter, R. G. Valentine, Commissioner, to the Secretary of the Interior, July 19, 1907.....	50	7
Letter, Frank Pierce to the Attorney General, June 26, 1909	51	8
Letter, Paul A. Ewert to Franklin Pierce, July 10, 1909....	52	9
Letter, Walter S. Fisher to James S. Davenport, June 8, 1911	52	10
Affidavit of Paul A. Ewert, grantee, filed with his application to have deed approved.....	52	11
Letter, R. A. Ballinger to George W. Wickersham, Attorney General, December 20, 1909.....	54	12
Letter, R. A. Ballinger to the Commissioner of Indian Affairs, December 20, 1909.....	55	13
Letter, Paul A. Ewert to Secretary of the Interior, April 5, 1913.....	56	14
Letter, Paul A. Ewert to Franklin K. Lane, May 5, 1913..	57	15
Letter, Paul A. Ewert to F. H. Abbott, May 9, 1913.....	59	16
Defendant's answer to the motion of plaintiffs to set aside submission of case, etc.....	61	17
Notice of application for leave to file amended answer to plaintiffs' motion to set aside submission of case, etc.....	67	18
Defendant's amended answer to plaintiffs' motion to set aside submission of the case, etc.....	68	19
Letter from the Commissioner of Indian Affairs, July 19, 1909, excerpt of.....	74	20
Letter from Frank Pierce, June 26, 1909, excerpt of..	74	21
Letter from Frank Pierce, November 19, 1909, excerpt of	75	22
Letter, George W. Wickersham, Attorney General, to R. A. Ballinger, Secretary of the Interior, December 21, 1909, excerpt of.....	75	23
Letter, Walter L. Fisher, Secretary of the Interior, to Congressman Davenport, June 8, 1911, excerpt of...	76	24
Letter, Frank Pierce to the Attorney General, June 26, 1909.....	77	25
Leinen Reports, excerpt of.....	78	26
Letter, Wade H. Ellis to Frank Pierce, July 2, 1909, excerpt of.....	79	27
Letter from R. G. Valentine, Commissioner, July 19, 1909, excerpt of.....	82	28
Letter, E. B. Merritt to A. Scott Thompson, June 14, 1917	83	29

INDEX.

iii

	Original.	Print.
Letter, A Scott Thompson to the Commissioner of Indian Affairs, June 22, 1917.....	84	84
Order submitting motion to set aside submission of case.....	87	87
Order overruling plaintiffs' motion to reopen case.....	87	87
Decree, March 4, 1918.....	88	88
Statement of evidence.....	88	88
Caption	88	88
Testimony for plaintiffs.....	89	89
Testimony of George Redeagle.....	89	89
A. W. Abrams.....	90	90
W. M. Smith.....	106	106
Colloquy between court and counsel.....	113	113
Testimony of Paul A. Ewert.....	116	116
M. C. Farkenburg.....	120	120
S. A. Roberts.....	121	121
Testimony for defendant.....	124	124
Testimony of Paul A. Ewert.....	124	124
Paul A. Ewert (recalled).....	125	125
Ira C. Beaver.....	127	127
Horace D. Durant.....	131	131
Motion for finding in favor of defendant.....	132	132
Plaintiffs' exhibits.....	132	132
1—Certified copy of patent to Charles Bluejacket, Sep- tember 26, 1896.....	132	132
2—Letter, Paul A. Ewert, special assistant to the At- torney General, to Wesley M. Smith, January 19, 1909.....	135	135
3—Letter, Paul A. Ewert, special assistant to the At- torney General, to W. T. Apple, trustee, January 7, 1909.....	136	136
4—Letter, Paul A. Ewert, special assistant to the At- torney General, to Walt Apple, January 7, 1909.....	137	137
5—Letter, Paul A. Ewert, special assistant to the At- torney General, to Wesley M. Smith, March 20, 1909	138	138
6—Letter, Paul A. Ewert, special assistant to the At- torney General, to Walter T. Apple, June 19, 1909	139	139
7—Letter, Paul A. Ewert, special assistant to the At- torney General, to Wesley M. Smith, February 11, 1911.....	139	139
8—Letter, Paul A. Ewert to Wesley M. Smith, March 13, 1911.....	140	140
9—Letter, Paul A. Ewert, special assistant to the At- torney General, to Wesley M. Smith, January 15, 1909.....	141	141
10—Probate proceedings in the matter of the estate of William Bluejacket <i>et al.</i> , minors, in the county court of Ottawa County, Oklahoma.....	142	142
Petition of Carrie Bluejacket, as guardian of the estate of William Bluejacket <i>et al.</i> , to sell real estate.....	142	142

	Original.	Pg.
Petition of L. A. Lafaller, as guardian of the estate of Cora Lafaller <i>et al.</i> , minors, to sell real estate.....	144	144
Waiver of notice of hearing of petition to sell real estate by William Bluejacket <i>et al.</i> , minors, etc.....	145	145
Order for sale of real estate by L. A. Lafaller, guardian of the estate of Cora Lafaller <i>et al.</i> , minors, by county judge, July 17, 1908.....	146	146
Order for sale of real estate by Carrie Bluejacket, guardian of the estate of William Bluejacket <i>et al.</i> , minors, by county judge, July 17, 1908.....	148	148
Petition of Carrie Bluejacket <i>et al.</i> for sale of inherited Indian lands.....	149	149
Report of sale of certain real estate by Carrie Bluejacket, guardian of the estate of William Bluejacket <i>et al.</i> , minors.....	151	151
Certificate of Judge Campbell as to the statement of evidence, etc.	153	153
Remonstrance of Paul A. Ewert, appellee, to the settling of the transcript of record.....	154	154
Affidavit of Paul A. Ewert in support of remonstrance to the settling of the transcript of record.....	155	155
Notice of presenting bill of exceptions for approval.....	155	155
Stipulation extending time to file transcript of record....	156	156
Notice of presenting bill of exceptions for approval.....	156	156
Letter, H. W. Currey to Paul A. Ewert, November 15, 1918.	158	158
Affidavit of Cora Hallam in support of remonstrance to the settling of transcript of record.....	160	160
Approval of the bill of exceptions by district judge, etc....	162	162
Petition for an order allowing appeal.....	163	163
Assignment of errors.....	163	163
Bond on appeal.....	165	165
Complainants' <i>præcipe</i> for transcript.....	167	167
Notice of application for leave to amend answer by interlineation	168	168
Application for leave to amend answer by interlineation.....	168	168
Order granting leave to amend answer.....	169	169
Entry in appearance docket of the filing and entering of amended answer of defendant in opposition to application to set aside submission of case.....	170	170
<i>Præcipe</i> of defendant for additional parts of the record.....	170	170
Affidavit of Cora Hallam as to service of defendant's <i>præcipe</i> for additional parts of the record.....	171	171
Notice of the filing of defendant's <i>præcipe</i> for additional parts of the record.....	171	171
Copy of defendant's <i>præcipe</i> for additional parts of the record	172	172
Plaintiffs' objections to defendant's <i>præcipe</i> for additional parts of the record.....	173	173

INDEX.

v

	Original.	Print.
Order for the transmission of certain original exhibits to the appellate court.....	173	173
Clerk's certificate to transcript.....	174	174
Proceedings in U. S. circuit court of appeals.....	175	175
Appearance of Mr. Hiram W. Currey and Mr. Arthur S. Thompson as counsel for appellants.....	175	175
Appearance of Mr. Leslie J. Lyons as counsel for appellants	175	175
Appearance of Mr. Paul A. Ewert and Mr. Henry C. Lewis as counsel for appellee.....	176	176
Appearance of Mr. W. H. Kornegay as counsel for appellee.	176	175
Notice and motion of appellee to dismiss.....	176	176
Protest of appellants against motion to dismiss.....	182	179
Answer of appellee to protest of appellants against motion to dismiss.....	189	184
Order of submission of motion to dismiss, etc.....	196	188
Order denying motion of appellee to dismiss appeal and motion of appellants for consolidation with case No. 5315 and granting continuance.....	196	189
Order of submission on merits.....	197	189
Opinion, U. S. circuit court of appeals.....	198	189
Decree, U. S. circuit court of appeals.....	208	197
Motion for appellee for rehearing.....	210	198
Supplemental petition of appellee for rehearing.....	255	224
Order denying petitions for rehearing.....	298	251
Motion of appellee for stay of mandate pending filing of petition for appeal to Supreme Court U. S.....	298	252
Order staying issuance of mandate.....	299	252
Petition of Paul A. Ewert for appeal to Supreme Court U. S. and order allowing same.....	299	253
Assignment of errors on appeal to Supreme Court U. S....	301	254
Bond on appeal to Supreme Court U. S.....	308	258
Præcipe of Paul A. Ewert for transcript on appeal to Supreme Court U. S.....	310	259
Citation on appeal to Supreme Court U. S. and affidavit of service	313	261
Waiver of citation on appeal to Supreme Court U. S., etc..	315	262
Clerk's certificate to transcript.....	316	263
Caption to transcript from U. S. circuit court of appeals on cross-appeal	317	264
Petition of Carrie Bluejacket <i>et al.</i> for a rehearing.....	318	264
Order denying petitions for rehearing.....	319	265
Petition of appellants for appeal to Supreme Court U. S.....	320	265
Assignment of errors of appellants on appeal to Supreme Court U. S.....	321	266
Order allowing appeal by appellants to Supreme Court U. S...	323	267
Bond of appellants on appeal to Supreme Court U. S.....	324	268
Citation on cross-appeal to Supreme Court U. S., with acceptance of service.....	326	269
Præcipe for transcript on cross-appeal to Supreme Court U. S..	329	270
Clerk's certificate to transcript.....	330	270

Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1919, said Court, before the Honorable Walter H. Sanborn and the Honorable Kimbrough Stone, Circuit Judges, and the Honorable Thomas Munger, District Judge.

Attest:

[Seal of the United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
*Clerk of the United States Circuit Court of
Appeals for the Eighth Circuit.*

Be it Remembered that heretofore, to-wit: on the twentieth day of November, A. D. 1918, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Eastern District of Oklahoma, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain case wherein Carrie Bluejacket, a widow, et al., were Appellants, and Paul A. Ewert was Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is the words and figures following, to-wit:

a (Citation and Affidavit of Lea Pace as to Service.)

United States of America,

To Paul A. Ewert—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the Clerk's Office of the United States District Court for the Eastern District of the State of Oklahoma, wherein Carrie Bluejacket, a widow, Rosie B. Daugherty, and husband, Edward Daugherty, Ida M. Holden and husband, Edward L. Holden, Walter Bluejacket, Edward Bluejacket and wife, Delfa Bluejacket, Blanche Bear, formerly Blanche Bluejacket, and Amy Bluejacket and Clyde Bluejacket, by their next friend, Carrie Bluejacket, their mother, Cora Arnett, formerly Cora LaFalier, and Louis Pascal, are plaintiffs and you are defendant, to show cause, if any there be, why the decree rendered against the said plaintiff as in said appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Ralph E. Campbell, Judge of the District Court of the United States, for the Eastern District of the State of Oklahoma, this 21st day of August, A. D. 1918.

RALPH E. CAMPBELL,
Judge of the District Court of the United
States for the Eastern District of the
State of Oklahoma.

b (Affidavit of Lea Pace as to Service of Citation.)

State of Missouri,

County of Jasper—ss.

Lea Pace, of lawful age, being duly sworn, upon her oath states that she is a stenographer and employed in the office of Hiram W. Currey; that on the 29th day of August, 1918, she delivered to Paul A. Ewert, named in the foregoing writ, a true copy of the same at his office in the City of Joplin, Jas-

per County, Missouri; that before delivering the said copy the said Paul A. Ewert and the said Lea Pace compared the said copy with the original and found the same to be a true and correct copy.

LEA PACE.

Subscribed and sworn to before me this 29th day of August, 1918.

(Notarial Seal)

VIRGINIA A. DAVIS,

My commission expires March 7, 1922.

1

Petition.

In the District Court of the United States for the Eastern District of the State of Oklahoma.

Carrie Bluejacket, a widow, Rosie B. Daugherty, and husband, Edward Daugherty, Ida M. Holden, and husband, Edward L. Holden, Walter Bluejacket, Edward Bluejacket, and wife, Delpha Bluejacket, Blanche Bear, formerly Bluejacket, and Amy Bluejacket and Clyde Bluejacket, minors, by their next friend, Carrie Bluejacket, their mother, Plaintiffs,

No. vs.

Paul A. Ewert, Defendant.

Plaintiffs for cause of action against the above named defendant state:

I.

That the plaintiffs are each residents of the Eastern Division of the United States District Court, sitting in and for the State of Oklahoma;

II.

That Charles Bluejacket was a Quapaw allottee, being Numbered 16, of the Quapaw Tribe in the Quapaw Agency, Oklahoma; That said Charles Bluejacket died intestate in the month of May, 1907, leaving as his heirs at law the plaintiffs herein, and one William Bluejacket, and Cora LeFolier Arnett and Louis Pascal, whose relationship to said testator was as follows:

2 Carrie Bluejacket, widow; Rosie B. Daugherty, daughter; Ida M. Holden, daughter; Walter Bluejacket, son; Edward Bluejacket, son; William Bluejacket, son; Blanche Bluejacket, daughter; Amy Bluejacket, daughter; and Clyde Bluejacket, son; Cora Arnett, formerly Cora LaFolier, granddaughter by a former marriage; and Louis Pascal, a grandson,

said Pascal being full brother to the said Cora Arnett; that said Amy Bluejacket and Clyde Bluejacket are now minors and bring this suit by their next friend and mother, Carrie Bluejacket;

The [the] said William Bluejacket, aforesaid child, has since died intestate without marriage or issue, leaving his mother, Carrie Bluejacket, as his only heir.

That the defendant, Paul A. Ewert, is a [citizens] of the State of Missouri, and resides in the City of Joplin, Jasper County, State of Missouri, and that this suit involves a construction of the acts of Congress restricting the rights of Quapaw Indians from alienating lands severally allotted to Quapaw Indians, and the Acts of Congress enacted for the protection of Indians.

III.

The plaintiffs aver that the Government of the United States, by its officers and agents, acting under authority of the Acts of Congress, allotted to said Charles Bluejacket, a Quapaw Indian, the

East Half of the Southwest Quarter of Section thirty two (32), and the Southwest Quarter of the Southwest Quarter of said Section thirty-two (32), of Township twenty-nine (29) North, Range twenty-four (24) East, of the Indian Meridian, now Ottawa County, Oklahoma, and Lots one (1) and two (2) of the Northeast Quarter of Section five (5), Township twenty-eight (28), North, Range twenty-four (24) East of the Indian Meridian, now Ottawa county, Oklahoma, in all containing two hundred (200) acres, more or less,

as the lawful share and allotment of the land of the United States to said Indian, and afterwards, on the 26th day of September, 1896, the United States by its deed of patent

3 conveyed said land to the said Charles Bluejacket;

That the said Charles Bluejacket accepted said patent and took possession and enjoyment of said land, and that a true copy of said patent is hereto attached, marked Exhibit A, and made a part hereof;

That the said Charles Bluejacket, while in the possession of said land, deceased, leaving the persons above named as his sole and only heirs at law, and that said persons, by reason of such inheritance became the owners of the above described lands, and said plaintiffs did enter into possession of said lands and had and retained the full possession and enjoyment thereof until the 8th day of April, 1909, subject to the restrictions of the Laws of the United States, as set forth in the

various Acts of Congress and as set forth in said patent, with power to alienate the same under the order and rules promulgated by the Secretary of the Interior.

IV.

Plaintiffs state that the defendant, Paul A. Ewert was on the 8th day of April, 1909, and for a long time prior and subsequent thereto by Commission duly issued under the laws of the United States, a Special Assistant Attorney General of the United States, and specially directed and commissioned by the Honorable George Wickersham, then Attorney General of the United States, to act as such Special Assistant Attorney General in and for the Quapaw Agency of the State of Oklahoma, and to enforce and require due observance by all white persons having dealings with the Indians of the Quapaw Agency of the Acts of Congress enacted for their—said Quapaw Indians'—benefit; and that it was the special official duty of the said Special Assistant Attorney General to protect any allottee or the heirs of any allottee, holding allotted and restricted lands, in the holding and disposition of their said

land, and to protect and enforce and compel due
4 obedience to and observance of the guardianship of the United States over allottees or their heirs and their lands located in said Quapaw Agency, and that said Paul A. Ewert as such Special Assistant Attorney General of the United States kept an office in the City of Miami for a long time prior and subsequent to the 8th day of April, 1909;

That the said Paul A. Ewert, with great pains caused it to be circulated among the Indians of said Quapaw Agency that he was such Special Assistant Attorney General to Attorney General Wickersham and that he was charged with the duties and obligations of protecting the rights of the Indians under tutelage and guardianship of the Government of the United States, and that he would compel strict observance of the rights of said Indians to the end that no unfair advantage should be taken of them, or any thereof, by white men dealing with them in and for their lands; That the said Paul A. Ewert caused to be circulated among the Indians the fact that he required a great many white men to yield up and cancel farm and mining leases held on Indian lands, and that he was keeping special watch and observation over all dealings for land with said Indians, and assumed the position of Attorney for all Indians of the Quapaw Agency in all matters relating to their allotted lands or to their rights as allottees or heirs of allottees to lands located in said Agency;

That these plaintiffs had been informed of all these claims of authority by the said Paul A. Ewert, and of the position

which the said Paul A. Ewert occupied as a Special Assistant Attorney General of the United States, and of his power and authority and by reason of said facts the said Paul A. Ewert acquired great influence over the Indians of the Quapaw Agency, and particularly over the plaintiffs herein.

5

V.

Plaintiffs aver that in the early part of the year 1909 these plaintiffs, and other said heirs, acting in their own behalf as adults, and through their respectively appointed guardians petitioned the Indian Agent located at Wyandotte, Oklahoma, having jurisdiction over the Indians and their lands of the Quapaw Agency, to cause the above described lands to be advertised for sale; That the said lands were duly advertised for sale to the highest bidder under such rules and regulations as the Secretary of the Interior had promulgated, and that on or prior to the 8th day of April, 1909, said lands were sold to the defendant herein for the sum of Five Thousand Dollars, and that the said Paul A. Ewert was the successful bidder, and said land was sold to him, the said Paul A. Ewert for the sum of Five Thousand Dollars, and that the bid of the said Paul A. Ewert was the sole and only bid offered, and that the money was paid in the sum of Five Thousand Dollars, to the said Indian Agent for the benefit of these plaintiffs and the other grantors in said deed;

That said deed was submitted to the Honorable Secretary of the Interior, and was by him approved on July 26, 1909, and that said deed was thereafter recorded in the office of the County Clerk of Ottawa County, Oklahoma, in Book 9, at page 505. A true copy of said deed being hereto attached, marked Exhibit B, and made a part of this petition.

These plaintiffs further aver and say that at the time this land was sold the same was appraised by the Indian Agent but that such appraisal was not made public, and that these plaintiffs do not know, nor did not know at the time of the execution of the deed, what the amount of such appraisal was.

6

These plaintiffs further state that at the time of the offering of said bid by said defendant, Paul A. Ewert, said Paul A. Ewert was acting in the capacity aforesaid, as Special Assistant Attorney General to the United States of America, and that said lands at such time were of the reasonable value of Ten Thousand Dollars, and that these plaintiffs did procure a purchaser for said land who was ready, able and willing to purchase the same for the sum of Ten Thousand Dollars, and that there were other prospective purchasers

that knew the land and that were willing to bid for the purchase of same as much as Ten Thousand Dollars, and these plaintiffs state that the said Paul A. Ewert, in violation of his duties as imposed by his special employment, and being then and there in the employ of the United States in Indian affairs in the Quapaw Agency, of Oklahoma where said lands were located, did discourage said bidders by telling them that the lands were not worth the amount that they were offering to pay, and that there were various conflicting mining leases on said land, and that litigation was going to arise by reason of such mining lease, and that it would be ten years before said land was free from litigation and clear of all mining claims thereon; and that in truth and in fact there were no valid mining leases on said land, and that there were no persons in possession of said ground claiming any mining rights thereon, and that this defendant well knew these facts;

That said bidders, by reason of such statements and conduct on the part of said Paul A. Ewert, made no bid on said land, and said Paul A. Ewert as a result thereof became the purchaser of said land for the sum mentioned; That the said Paul A. Ewert, defendant herein, by reason of his employment by

7 Indian affairs, and particularly in the Quapaw Agency of Oklahoma was incompetent to purchase, and was prohibited from purchasing said land, and dealing with said Indians in any way whatsoever.

VI.

Plaintiffs aver that it is the policy of the Government of the United States to discourage alienation by Indians in the Quapaw Agency of their lands received by them as their allotted lands and as the heirs of allottees and not permit any sale of the lands by Indians except when the necessity of the Indian holder demands such sale, and when it is for the best interests of such Indians, and then only for the fair and reasonable market value of said allotments, and to that end the Acts of Congress forbid any sale of allotted lands by Indians of the Quapaw Agency except under the supervision and care of the Secretary of the Interior, and that it was the duty of the said Paul A. Ewert as Special Assistant Attorney General of the United States, to respect, uphold and enforce said policy, and that by reason of such policy and such Acts of Congress and by reason of the aforesaid official position of the said Paul A. Ewert he was wholly disabled and prohibited from acquiring the title to plaintiffs' land by such purchase, directly or indirectly, and that by the purchase aforesaid and the taking possession of said land the said Paul A. Ewert, by

his own wrong, became the holder of said land in trust for these plaintiffs.

Plaintiffs aver that it was the duty of the defendant Paul A. Ewert as the Special Assistant Attorney General of the United States, charged with enforcing the laws for the protection of the Indians of the Quapaw Agency, to inform the Secretary of the Interior of the real value of the aforesaid land, and that said Paul A. Ewert well knew that said land was of the value of Fifty Dollars per acre, and well
8 knew that there were purchasers ready, able and willing to pay the sum of Fifty Dollars per acre for said land, but that said Paul A. Ewert, in violation of his said duty, failed to so inform the said Secretary of the Interior, and that the said Secretary of the Interior at the time he approved the aforesaid deed was wholly ignorant of the fact that said land was of the value of Fifty Dollars per acre or Ten Thousand Dollars, and wholly ignorant of the fact that there were purchasers ready, willing, and able to pay Ten Thousand Dollars for said land.

Plaintiffs further state that said defendant after said deed was duly approved, entered into the possession of said land, and has since occupied the same; That all of said land is in cultivation, being rich bottom land with the exception of about ten or fifteen acres, and that a valuable lead and zinc mine has been opened on said land, and it has been mined for some time by this defendant through his lessees, and, that this defendant has taken large sums of money therefrom as his royalty upon the sales of ores mined therefrom, and that said land is located in the mineralized belt, and that a fair and reasonable market value of said land at the present time would be not less than Fifteen Thousand Dollars, and these plaintiffs further aver that the said defendant has had possession of said land for farming purposes for and during the period of time since July 29, 1909, and that a reasonable farm value thereof is the sum of Four Hundred Dollars per year.

Plaintiffs aver that on the 20th day of December, 1910, said defendant mortgaged the land so acquired from these plaintiffs to Lillias Barrowman, to secure the payment of the sum of Thirty Five Hundred Dollars borrowed from said mortgagee on said land, and that the said mortgagee now is
9 the holder in good faith and for value of said mortgage and note, and that the same constitutes a mortgage lien upon the plaintiffs' aforesaid land, for the sum of Thirty Five Hundred Dollars and the accrued interest thereon.

These plaintiffs further state that at the time of the execution of the said deed, William Bluejacket, Blanche Bear, for-

merly Blanche Bluejacket, Amy Bluejacket and Clyde Bluejacket, were minors, the said Carrie Bluejacket being their guardian, duly appointed by the County Judge of Ottawa County, and that said Cora Arnett, then Cora LaFalier, and Louis Pascal were at said time minors, and their guardian was L. A. LaFalier, duly appointed by the County Judge of Ottawa County, Oklahoma, and that said deed purports to have been signed by said guardians for and in behalf of said minors.

These plaintiffs aver and state that at no time were said guardians authorized by the said Court to sell the interests of said minors in said land, and said County Court never caused said interests of said minors to said land to be appraised as required by the Statutes of the State of Oklahoma, and as a fact there was no attempt made on the part of said guardians to comply with the statutes of the State of Oklahoma regarding the sale of lands of minors, and that said deed and sale has never been reported to said County Court and has never been approved by said County Court, and that by reason thereof said deed is absolutely null and void in so far as it attempts to convey the interests of said minors in said land.

Wherefore: Premises considered, plaintiffs pray the Court to adjudge and decree that the aforesaid deed taken by this defendant from said plaintiffs, in so far as same attempts to convey the title and interest therein of William Blue-
10 jacket, Blanche Bluejacket-Bear, Amy Bluejacket, Clyde Bluejacket, is void and of no effect, and that the said defendant holds the title to said land for that proportionate part of same as was conveyed to him by the adult grantors therein, in trust and for the use and benefit of such grantors, who are the plaintiffs herein, and that the defendant be required to account to the plaintiffs for the sum of Thirty Five Hundred Dollars received by him upon the mortgage of said land, and for a judgment of the rental value of said land at the rate of Four Hundred Dollars per annum during the time that he has had possession thereof, and that the said defendant be required to account for and pay over unto these plaintiffs all royalties received by him from the sale of lead and zinc ores sold from said land since the execution of said deed, and that the plaintiffs have such other and further general relief as they may be entitled to under the rules and principles of equity and as the Court may deem right and just, and the plaintiffs now offer to comply with such orders and decrees as

the Court may impose upon them, or may adjudge to be right and just as a condition for the remedy herein prayed for.

A. SCOTT THOMPSON

H. W. CURREY

Attorneys for Plaintiffs.

(Exhibit A.)

The United States of America:)

To)

Charles Bluejacket)

Patent : :

No— 16.

The United States of America:

To All To Whom These Presents Shall Come Greeting:

Whereas, There has been deposited in the General Land Office of the United States an order bearing date March 30, 1896, from the Secretary of the Interior, accompanied by a schedule of allotments of land, dated November 15, 1895, from the Commissioner of Indian Affairs, approved by the Secretary of the Interior March 28, 1896, whereby it appears that under the provisions of the Act of Congress approved March 2, 1895, (28 Stats. 907) Charles Bluejacket an Indian of the Quapaw tribe, residing on the Quapaw Reservation in the Indian Territory, has been allotted the following described land, viz:—

The East-Half of the South-west Quarter of the South West Quarter of the South-West Quarter of Section Thirty-Two, in Township Twenty-nine North and North East Quarter of Section Five in Township Twenty-eight North of Range Twenty-Four East of Indian Meridian, in Indian Territory Containing Two Hundred acres.

Now, Know Ye, That the United States of America, in consideration of the premises, and conformity with the provisions in said Act of Congress approved March 2, 1895, the Order and Schedule of allotments aforesaid, Has Given and Granted, and by these presents Does Give And Grant, unto the said Charles Blue Jacket and to his heirs, the said tract above described, but with the stipulation and limitation contained in the aforesaid act, that the land embraced in this Patent shall be inalienable for the period of Twenty-Five Years from and after the date hereof.

To Have And To hold the same, together with all the rights, privileges, immunities and appurtenances of whatsoever na-

ture thereunto belonging, unto the said Charles Blue Jacket and to his heirs, forever;

Provided, as aforesaid that said tract shall be inalienable to the said period of Twenty-Five-years.

In Testimony Whereof, I, Grover Cleveland, President of the United States of America, have caused these Letters to be made Patent and the Seal of the general land Office to be hereunto affixed. Given under my hand at the City of Washington, this Twenty-Sixth day of September in the year of our Lord One Thousand Eight Hundred and Ninety-Six, and of the Independence of the United States the One-Hundred and Twenty-First.
By the president:—

GROVER CLEVELAND,

((L. S.))

By M. McKean, Secretary.

L. Q. C. Lamar,

Recorded Vol P.

Recorder of the General Land Office.

Department of the Interior:

General Land Office: Washington May 10-1909.

1909-50936.

B.

I hereby certify that the annexed Copy of Patent is a true and literal exemplification from the record in this office.

In Testimony Whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed at the City of Washington, on the day and year above written.

JOHN O'CONNELL,

((Seal))

Acting Recorder of the General Land Office.

Filed for record 9-22-09-9-A. M. Fee \$1.75.

Mailed to Paul A. Ewert, City, 9-22-09. C. G. James, Reg. Deeds.

12

(Exhibit B.)

Carrie Bluejacket-et-als.)	
To)	Indian Deed:
Paul A. Ewert)	

This Indenture, Made and entered into this Eighth day of April One Thousand Nine Hundred and Nine, by and between Carrie Bluejacket, as widow; Rose B. Daugherty, and Her husband, Edward Daugherty; Ida B. Holden, and her husband E. L. Holden; Walter Bluejacket; Edward Bluejacket, and his wife, Delpha Bluejacket; Carrie Bluejacket, as guardian of William Bluejacket; Blanche Bluejacket; Amy Bluejacket, and Clyde Bluejacket, minors, and L. A. LaFazier, as guardian of Cora LaFafalier and Louis Pascal, minors; and L. A. LaFazier, as husband of Flora LaFazier, deceased, of Quapaw Indian Agency, Ottawa County, Oklahoma, heirs of Charles Bluejacket, Quapaw Allottee No. 16, of Quapaw Agency, Okla., deceased, a Quapaw Indian, parties of the first part, and Paul A. Ewert, of Miami, Oklahoma, party of the second part;

Witnesseth, That said parties of the first part, for and in consideration of the sum of Five Thousand Dollars, in hand paid, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, and convey unto said party of the second part the following described real estate and premises situated in Ottawa County, State of Oklahoma, to-wit:—

The East-One-Half of the South-West Quarter of Section Thirty-Two (32); The South-West of the South-West Quarter of Section Thirty-Two (32), in Township Twenty-Nine (29), North, of Range Twenty-Four, (24) East, of the Indian Meridian, Oklahoma, and Lots Numbers One (1) and Two (2) of the North-east Quarter of Section Five (5), in Township Twenty-Eight-(28) North, of Range Twenty-Four (24) East of the Indian Meridian, Oklahoma, in all containing Two-Hundred acres, more or less,

Together with all the improvements thereon and the appurtenances thereunto belonging, and Warrant the title to the same.

To Have and To Hold said described premises unto the said party off the second part, his heirs, executors, administrators and assigns forever.

In Witness Whereof, The said parties of the first part have hereunto set their hands and seals the day and year first above written.

Witnesses:—)
Wm. D. Hodgkiss,)
B. N. O. Walker.)

CARRIE BLUEJACKET (Seal)
(her X mark)
ROSA BL. DAUGHERTY (Seal)
EDWARD DAUGHERTY (Seal)
IDA B. HOLDEN (Seal)
E. L. HOLDEN (Seal)
WALTER BLUEJACKET (Seal)
EDWARD BLUEJACKET (Seal)
DELPHA BLUEJACKET (Seal)
CARRIE BLUEJACKET
(Her X mark) as guardian for

WILLIAM BLUEJACKET (Seal)
BLANCHE BLUEJACKET (Seal)
AMY BLUEJACKET and (Seal)
CLYDE BLUEJACKET (Seal)
as guardian of
CORA LaFALIER and
LOUIS PASCAL, minors.
L. S. LaFALIER, (Seal) as husband of FLORA LaFALIER,
deceased.
R. M. SHRIVER,
F. J. LaFALIER

The above sign as witnesses to signature of L. A. Falier, as Guardian and husband of Flora LaFalier, deceased.

Superintendent's Acknowledgement:

Be It Remembered, That on this Eighth day of April, 1909, before the undersigned Superintendent for the Quapaw Agency, Oklahoma, personally appeared Carrie Bluejacket, as widow and heir, Rose B. Daugherty and her husband Edward Daugherty; Ida B. Holden, and her husband E. L. Holden, Walter Bluejacket, Edward Bluejacket and his wife Delpha Bluejacket, and "Carrie Bluejacket as Guardian for William, Blanche, Amy, and Clyde Bluejacket minors; heirs of Charles Bluejacket, to me personally known to be the identical persons who executed the within instrument of writing, and such persons duly acknowledged the execution of the same as their free and voluntary act and deed for the uses and purposes therein set forth:—I further certify that the

contents, purpose, and effect of the deed of conveyance were explained to, and fully understood by the grantors.

In Testimony Whereof, I have hereunto subscribed my name, officially, on the date last above written.

IRA C. DEEVER, Superintendent.

13 State of Oklahoma,
County of Ottawa—ss:

Be It Remembered, That on this Eighth day of April, A. D. 1909, before the undersigned, a Notary Public in and for the County and State aforesaid, personally appeared Carrie Bluejacket, widow; Rosa B. Daugherty, and her husband, Edward Daugherty; Ida B. Holden, and her husband, E. L. Holden; Walter Bluejacket; Edward Bluejacket and his wife, Delpha Bluejacket, and "Carrie Bluejacket as guardian for William Bluejacket; Blanche Bluejacket; Amy Bluejacket, and Clyde Bluejacket, minors, to me personally known to be the identical persons who executed the within instrument of writing, and such persons duly acknowledged the execution of the same, as their free and voluntary act and deed for the uses and purposes therein set forth.

In Testimony Whereof, I have hereunto subscribed my name and affixed my Official seal on the day and year last above written.

(Seal) C. B. COE, Notary Public.

My commission expires Feb. 28th, 1912.

State of Oklahoma,
County of Ottawa—ss.

Be It Remembered, That on this 13th day of April A. D. 1909, before the undersigned a Notary Public, in and for the County and State aforesaid, personally appeared L. A. LaFalier, as guardian for Cora LaFalier and Louis Pascal, minors, and as husband of Cora LaFalier, deceased, to me personally known to be the identical persons who executed the within instrument of writing, and such person duly acknowledged the execution of the same as his free and voluntary act and deed for the uses and purposes therein set forth.

In Testimony Whereof, I have hereunto subscribed my name and affixed my official seal on the day and year last above written.

(Seal) R. M. J. SHRIVER, Notary Public.

My com expires Mch 26-1910.

Department of the Interior, Office of Indian Affairs:

July-19, 1909.

The within Deed is respectfully submitted to the Secretary of the Interior with the recommendation that it be disapproved.

R. W. VALENTINE, Commissioner.

Department of the Interior:

July 26-1909.

The within Deed is hereby approved.

FRANK PIERCE,

First Assistant Secretary.

Office of Indian Affairs: Land Division:

Aug-7-1909.

Recorded in Deed Book, Inherited Indian Lands, Vol. 22-Page 127.

Approved July 26-09.

Frank Pierce.

Filed for record 9-22-09-9-A. M. fee \$2.50

Mailed to Grantee City 9-22-09. C. G. James, Reg. Deeds.

14 Endorsed: Petition, filed in the U. S. District Court
June 12, 1916.

15

Answer.

Comes now the defendant in the above entitled action and for his answer to the Complaint filed herein, says:

I.

The defendant, for his answer to the allegations contained in paragraph I of said complaint, says that he is without knowledge as to whether each of the said plaintiffs, or any of them, are residents of the Eastern Division of the United States District Court sitting in and for the State of Oklahoma, and therefore demands proof of the same.

II.

Defendant, for answer to the allegations contained in section two of Paragraph II of said Complaint, says that he is without knowledge as to whether or not the said Charles Bluejacket died intestate in the month of May, 1907, leav-

ing the heirs named, with their relationship to the deceased as named in said complaint, and demands proof of the same, but admits that the said Charles Bluejacket died on or before the 1st day of January, 1908.

16 Defendant, answering the second section contained in Paragraph II of said complaint, says that he is without knowledge as to whether or not William Bluejacket is dead, and if he is dead, whether he died intestate without marriage or issue living, leaving only his mother Carrie Bluejacket, as his only heir.

Defendant, answering the third section contained in Paragraph II of said complaint, admits that he is a citizen of the State of Missouri and resides in the city of Joplin, Jasper County, State of Missouri, but denies that the allegations that "this suit involves a construction of the acts of Congress restricting the rights of Quapaw Indians for alienating lands severally allotted to Quapaw Indians, and the Acts of Congress enacted for the protection of the Indians," are true.

III.

Defendant, for answer to the first section of Paragraph III of complainants' complaint, admits the allegation thereof that the said Charles Bluejacket was allotted certain lands described in said Paragraph III of said complaint, but is without knowledge as to whether the Exhibit "A" attached to said complaint is a true and correct copy of said patent.

Defendant for answer to the second section of said Paragraph III, admits that the lawful heirs of Charles Bluejacket, deceased, upon his death, entered into the possession of the lands described in the complaint and that they retained the full possession and enjoyment thereof until the 8th day of April 1909, and for sometime thereafter through their lessees, but denies the allegation of law set up in the last two lines of said Paragraph III.

IV.

Defendant denies the allegation contained in the first eight lines of Paragraph IV. of said complaint, which alleges that "the defendant, Paul A. Ewert was on the 8th day of

17 April, 1909, and for a long time prior and subsequent thereto by Commission duly issued under the laws of the United States, a Special Assistant Attorney General of the United States, and specially directed and commissioned by the Honorable George Wickersham, then Attorney General of the United States, to act as such Special Assistant

Attorney General in and for the Quapaw Agency of the State of Oklahoma."

Further answering said section one of Paragraph IV. of said complaint, defendant admits that he as Special Assistant Attorney General of the United States, kept an office in the city of Miami, Oklahoma, from on or about the 1st day of December, 1908, until the 11th day of August, 1910, but expressly denies the allegations that it was his duty "to enforce and require due observance by all white persons having dealings with the Indians of the Quapaw Agency of the Acts of Congress enacted for their—said Quapaw Indians'—benefit; and denies that "it was the special official duty of said special assistant Attorney General to protect any allottee or the heirs of any allottee, holding allotted and restricted lands, in the holding and disposition of their said land, and to protect and enforce and compel due obedience to and observance of the guardianship of the United States over allottees or their heirs and their lands located in said Quapaw Agency".

Further answering, defendant alleges that the said allegations are irrelevant and redundant matter and not properly a part of the complaint herein, and asks that the same be stricken out and no testimony be permitted to be offered in proof and substantiation thereof.

Defendant, further answering the remaining sections of said Paragraph IV. shows to the court that the said allegations of such irrelevant and redundant matter are inserted in said complaint with sinister purpose and for sinister motives, and asks that this court strike out the same for
18 said reasons, and that it does not permit complainants to offer any proof in substantiation of the same, upon the ground that said allegations are irrelevant and redundant and immaterial and not properly a part of the pleadings in this case. Defendant denies specifically each of the said allegations contained in said paragraphs, and denies that he circulated, or caused to be circulated, the reports therein alleged, and denies that he "assumed the position of attorney for all Indians of the Quapaw Agency in all matters relating to their allotted lands or to their rights as allottees or heirs of allottees of lands located in said Agency." And denies that he assumed to act, or did act, in any other capacity than as authorized by the letter of appointment hereinafter referred to in this answer, and denies that he obtained great authority over the complainants in this action by reason of his said appointment, because prior to the execution and delivery of the deed mentioned in said com-

plaint, he had absolutely no acquaintance with the said complainants and never saw them and never conversed with them about any Indian matters of any kind.

V.

Defendant, further answering the complaint herein, and particularly the allegation contained in Paragraph V. thereof, denies that "in the early part of the year 1909 these plaintiffs and other said heirs acting in their own behalf as adults, and through their respectively appointed guardians petitioned the Indian Agent [locate] at Wyandotte, Oklahoma, having jurisdiction over the Indians and their lands of the Quapaw Agency, to cause the above described lands to be advertised for sale," but admits and alleges in answer to said allegation, that the said heirs, on or about the 20th day of July, 1908, did petition the Secretary of the Interior of the United States of America, to sell the said lands under and pursuant to Section 7 of the Act of Congress approved May 27, 1902, (32 Stats., 205-275) and in conformity with the rules and regulations promulgated thereunder by the said

Secretary of the Interior and by him approved September 19, 1907; and that they filed said petition duly made in conformity thereto, with Ira C. Deever, the Superintendent and Special Disbursing Agent of Quapaw Agency, having jurisdiction of said lands; and defendant admits that the said lands were duly advertised for sale to the highest bidder under the said Act of Congress and the rules and regulations promulgated by the Secretary of the Interior, and admits that on the 8th day of April, 1909, the said lands were sold to the defendant herein for the sum of Five Thousand Dollars (\$5,000.) and admits that the said defendant, Paul A. Ewert, was the successful bidder and that said lands were sold to him in accordance with the said Act of Congress and the rules and regulations promulgated thereunder, for the sale of inherited Indian lands, by the Secretary of the Interior of the United States of America, but denies that said sum of Five Thousand Dollars (\$5,000.) was paid to the Indian Agent for the benefit of these complainants and the other grantors in said deed, but alleges that the said purchase price was paid to the Secretary of the Interior of the United States of America for their benefit, in accordance with the said Act of Congress and the rules and regulations providing for the sale of inherited Indian lands promulgated thereunder.

Defendant for further answer, denies that he was the sole and only bidder at said sale, and alleges the fact to be that

the said lands were first duly advertised for sale under said Act of Congress and the rules and regulations thereunder promulgated by the Secretary of the Interior, sometime prior to the 17th day of August, 1908. That the said lands were first offered for sale in the manner provided by law under date of August 17th, 1908, at which time one Adelbert Hughes, who had caused said heirs to list said lands for sale in the first instance, did offer and bid the sum of Four Thousand Dollars (\$4,000.), and no more, for said lands, and that his said bid was rejected because it was under the appraised valuation of said lands.

That in accordance with the law and at the request of these complainants and the heirs of Charles Bluejacket, deceased, the said lands were again offered for sale under and pursuant to said Act of Congress and the rules and regulations thereunder, and bids were opened thereon under date of September 1, 1908, at which time there were no bids for said lands.

That thereafter the said lands were for a third time under said Act of Congress and the rules and regulations promulgated thereunder, offered for public sale to the highest bidder on October 26, 1908, and at that time there were no bids for said lands.

That thereafter, to-wit: on the 27th day of November, 1908, the said lands were for a fourth time offered for public sale to the highest bidder, under and pursuant to the Act of Congress and the rules and regulations promulgated thereunder, but same was not sold, because there were no bids received.

That thereafter, to-wit: On the 21st day of December, 1908, the said lands were for a fifth time offered for public sale to the highest bidder, under and pursuant to the Act of Congress and the rules and regulations promulgated thereunder, at which time, the defendant, Paul A. Ewert, made a bid on said lands of approximately Four Thousand Dollars (\$4,000.), which said bid was by the Secretary of the Interior rejected because it was under the appraised valuation.

That thereafter, to-wit: On the 25th day of January, 1909, said lands were for a sixth time offered for public sale to the highest bidder, under and pursuant to the Act of Congress and the rules and regulations promulgated thereunder, at which time, the defendant, Paul A. Ewert, bid the sum of Four Thousand Six Hundred Eighty Dollars (\$4,680.) for said lands, which said bid was rejected by the Secretary of

the Interior because it was less than the appraised valuation of said lands.

That thereafter, to-wit: On the 22nd day of February, 1909, the said lands were for the seventh time offered for public sale to the highest bidder, under and pursuant to the Act of Congress and the rules and regulations promulgated thereunder, at which time the defendant, Paul A. Ewert, bid 21 the sum of Four Thousand Dollars (\$4,000.) for one hundred sixty (160) acres of said land, to-wit: Lots One (1) and Two (2) of the Northeast Quarter (NE. $\frac{1}{4}$) of Section Five (5), Township Twenty-eight (28), Range Twenty-four (24) East, and the South One-half (S. $\frac{1}{2}$) of the Southwest Quarter (SW. $\frac{1}{4}$) of Section Thirty-two (32), Township Twenty-nine (29), Range Twenty-four (24), East, which said bid was rejected by the Secretary of the Interior of the United States, for reasons unknown to this defendant, except that it did not cover all of the said lands offered for sale.

That thereafter, to-wit: On the 29th day of March, 1909, the said lands were again for the eighth time, offered for sale by the Secretary of the Interior of the United States to the highest bidder, under and pursuant to said Act of Congress and the rules and regulations thereunder, and the defendant, Paul A. Ewert, bid therefor the sum of Five Thousand Dollars (\$5,000.), which said bid was accepted by the said Secretary of the Interior of the United States of America and by the said heirs of the said Charles Bluejacket, deceased.

That thereafter, to-wit: On the 8th day of April, 1909, and on the 13th day of April, 1909, all of the said heirs joined in due form of law by themselves and by their duly and lawfully appointed guardians of said petitioning minors, in the execution of a warranty deed wherein and whereby they conveyed to said defendant, Paul A. Ewert, by a deed of warranty, all of the hereinbefore described lands; that said deed of warranty was by the said Ira C. Deaver, Superintendent and Special Disbursing Agent of Quapaw Agency, duly transmitted to the Honorable Secretary of the Interior of the United States of America for his approval, with the recommendation that it be approved. That on the 19th day of July, 1909, the said deed was submitted to the Commissioner of Indian Affairs of the United States of America and by him on said date recommended to the Secretary of the Interior of the United States for his approval; that on the 26th day of July, 1909, the said deed was in all things approved by the Secretary of the Interior of the United States

22 and returned to the Honorable I. C. Deaver, Superintendent and Special Disbursing Agent Quapaw Agency by the Secretary of the Interior of the United States to be delivered to the said defendant, Paul A. Ewert, for [an] in behalf of the said Secretary of the Interior of the United States and the said grantors, the heirs of Charles Bluejacket, deceased, a copy of which said deed, together with all the endorsements thereon, is hereunto attached, marked Exhibit "A" and made a part of this Answer.

That the said deed was by said defendant, Paul A. Ewert, accepted and thereafter, to-wit: On the 22nd day of September, 1909, filed in the office of the Register of Deeds of Ottawa County, Oklahoma, and there recorded in Book 9 on pages 505-506 of the records of said office.

Defendant, making further answer to the last paragraph on page 5 of said complaint, says that he has no knowledge as to whether or not the complainants herein and the heirs of Charles Bluejacket, deceased, knew what the appraised value of the [—] of said lands were, and puts complainants upon their proof of the same, but defendant further shows to the court that under the hereinbefore mentioned rules and regulations promulgated by the Secretary of the Interior, it is expressly provided that "the appraisalment shall not be made public either before or after the sale, and no bid for less than the appraised value shall be considered," and defendant asks that the said paragraph on page 5 of the complaint be stricken out, upon the ground that the same is irrelevant and redundant, and that no testimony be received concerning the said allegations, upon the ground that the same is incompetent, irrelevant, redundant and immaterial.

Further answering said Paragraph V. defendant asks that all of that portion of the same found on pages 6 and 7, beginning with the words "these plaintiffs further state" and ending with the words "in any manner whatsoever", be stricken out, upon the ground that the same is irrelevant and redundant and immaterial, and that no evidence be received concerning the allegations therein, upon the ground that the same is incompetent, irrelevant, redundant and immaterial.

23 Defendant denies that he was acting in the capacity stated in said complaint, or after any manner of employment other than as hereinafter stated in the manner of his appointment, dated October 22, 1908, signed by Charles J. Boneparte, Attorney General of the United States.

Defendant denies that the lands were of the reasonable value of Ten Thousand Dollars (\$10,000.); denies that the com-

plainants ever procured a purchaser for said lands who was ready, willing and able to purchase the same for the sum of Ten Thousand Dollars (\$10,000.) and denies that there were other prospective purchasers who were willing to bid for the purchase of said land as much as Ten Thousand Dollars (\$10,000.); defendant denies that he at any time ever discouraged any bidder by telling him that the lands were not worth the amount that they were offering to pay, and that there were conflicting mining leases on the land, or that litigation was going to arise by reason of the said mining leases, and alleges the fact to be that he never talked with any person, or persons of any description, anywhere, or at any time, prior to the purchasing of the said land, concerning the same, and never knew, prior to his bidding on said land and purchasing the same, whether there were or were not other bidders.

Defendant further answering, states that it is true that the said lands were covered by numerous mining leases; that the royalties on said lands were sold; that the lands were leased in advance for agricultural purposes, and alleges the fact to be that there were persons in possession of said land and persons claiming the said land and mining the same at the time of the said purchase and for a long time thereafter, and that it was necessary for this defendant to institute suit to gain possession of said land for mining purposes; that he gained possession of said land for mining purposes several years after he purchased the same, and then only after a suit was instituted for the purpose of clearing the title to the said land and releasing it from the many mining leases upon it and from the sales of royalties.

Defendant denies that there were any bidders of any kind or character who were deterred from bidding upon said
24 lands by reason of any conduct of any kind upon the part of said defendant, Paul A. Ewert, and alleges that the said defendant, Paul A. Ewert, never knew or heard of any person who wanted to bid, or who contemplated bidding upon the said land after he had bid on it.

Defendant denies the allegation contained in the last six lines of said Paragraph V. that he, "by reason of his employment by the United States and as an officer thereof, engaged in Indian affairs, and particularly in the Quapaw Agency of Oklahoma was incompetent to purchase, and was prohibited from purchasing said land, and dealing with said Indians in any way whatsoever.

VI.

Further answering the allegations contained in said complaint, and particularly in Paragraph VI. thereof, defendant

shows to the court that all of the allegations contained in said Paragraph VI. are irrelevant and redundant and not within the issues of this case, and should be stricken out; and defendant further asks the court that no testimony be received in support of said allegations, upon the ground that the same is incompetent, irrelevant and immaterial.

Further answering, said defendant denies that it is the policy of the government to discourage the alienation by Indians of lands inherited by them, and alleges and charges the facts to be that under the law they are invited to make such sales at any time they so desire, under and pursuant to the provisions of said Act of Congress of May 27, 1902, *supra*, and alleges that the same was enacted for their especial benefit.

Defendant further denies that it was the duty of the said Paul A. Ewert, as Special Assistant Attorney General of the United States, in the capacity in which he was employed, to have anything whatever to do with the sales of Indian lands, or to [meddle] in them after any fashion, or to advise with the Secretary of the Interior or with the Indian Agent, or with any one else concerning them; that the matter of the sales of said lands was absolutely without the terms of his employment.

Defendant further denies that under the terms of his employment he was wholly disabled and prohibited from acquiring the title to complainants' lands made by purchase
25 in the manner in which it was purchased, and denies that by virtue of said purchase he became the holder of said lands in trust for these complainants.

Further answering the last section of Paragraph VI. found on page 7 of said complaint, defendant denies that it was his duty to inform the Secretary of the Interior of the real value of said land, or to in any wise make any suggestions to the Secretary of the Interior concerning the method or manner of handling the same, by reason of the fact that the statute prescribed the manner and method under which the said lands were to be sold.

Defendant denies that he knew that the land was of the value of Fifty Dollars (\$50.00) per acre, and denies that he knew that there were other purchasers of any kind or character willing and able to pay the sum of Fifty Dollars per acre for said land, and denies that in failing to so advise the said Secretary of the Interior of this fact, he was violating any of the duties of his office, and denies that the Secretary of the Interior, at the time he approved the said deed, was ignorant of the real value of said land, and denies that there

were any other prospective or contemplated purchasers at said sale, and therefore, the Secretary of the Interior could not have been so advised.

Defendant denies that after the said deed was approved, he entered into the possession of said land and has since occupied the same, and alleges the fact to be that he did not enter into the possession of it until the crop year of 1910, by reason of the fact that the same had been leased for agricultural purposes and the money collected in advance.

Defendant denies that all of said land is in cultivation or ever has been, and denies that it is rich bottom land, with the exception of ten or fifteen acres, and denies that it is valuable for lead and zinc mining purposes, and denies that a valuable lead and zinc mine has been opened up on the land, and denies that this defendant has taken large sums of money therefrom as his royalty upon the sale of ores mined thereon; and further denies that said land is located in the mineralized belt, and denies that the fair and reasonable market value of said land at this time, would be not less than

26 Fifteen Thousand Dollars (\$15,000.); and further denies that this defendant has been in possession of said land for farming purposes for and during the period of time since July 29, 1909, and denies that the reasonable farm value thereof is the sum of Four Hundred Dollars per year, and defendant alleges and charges the facts to be as follows: That only ninety acres of said land is bottom land and that at the time the defendant acquired same it was not rich bottom land and it not now rich bottom land, having been cultivated for nearly forty years, and being entirely worn out and incapable of raising a crop, and grown up with sprouts and shrubs and small trees; that eight acres of said land constitute a part of the bed of Spring River; that less than one hundred acres all told, of said land, can be cultivated and is tillable, although defendant has plowed up and put into cultivation every foot of said land capable of being cultivated; that twenty acres of said land is rocky meadow land and high and gravelly and raises but little, if any, hay; that the balance of said land is covered with rocks and scrub timber and cactus and is absolutely worthless for any purpose whatsoever, and is not worth the amount of the taxes levied annually against said land; and all of said land is not worth or of the fair value for farming purposes in excess of Two Hundred Dollars per year.

Defendant admits that said land is located at the very East end of what is commonly known as the Lincolnville mining district, but denies that the land is of any value whatsoever for mining purposes. Defendant admits that some prospect-

ing and mining operations have been carried on upon said land, and admits that he has received some royalty money therefrom, but charges the fact to be that he and his lessees have spent approximately Fifty Thousand Dollars in trying to discover ore upon said land and endeavoring to mine the same, and by reason of such operations, have lost in excess of Twenty-five Thousand Dollars, notwithstanding the fact that during the said prospecting period zinc ore has been at the highest price ever known in the history of the world, and defendant charges the fact to be that the land is absolutely worthless for mining purposes, and alleges that all attempts to mine said land have been abandoned.

27 Further answering said complaint, defendant shows to the court that both of the two paragraphs found on page 9 and up to the prayer for judgment, allege matters which are irrelevant and redundant and should be stricken out, and defendant objects to the introduction of any testimony tending to substantiate the same, upon the ground that the facts alleged are incompetent, irrelevant and immaterial and redundant.

Defendant admits that at the time of the execution of the said deed, Carrie Bluejacket was the duly and lawfully appointed guardian of all of said minors, except Cora LaFaliere, now Cora Arnett, and Louis Pascal; and admits that L. A. LaFaliere was duly and lawfully appointed their guardian, and admits that the said deed was signed by said guardians for and in behalf of their said wards and minors. Defendant denies the truth of the allegation that the said guardians were at no time authorized by the court to sell the interests of said minors, and admits that the said lands were not appraised under the laws of the State of Oklahoma, but were appraised as required by the laws of the United States under which said lands were sold, and denies the allegation that the said deeds and sale was never reported to said County Court; and denies that said deed is absolutely null and void in so far as it attempts to convey the interests of the said minors in said land; and alleges the fact to be that the said Carrie Bluejacket and L. A. LaFaliere were, many months prior to the appointment of the said defendant as Special Assistant Attorney General, duly appointed guardians of said minors, and that months before the defendant was ever appointed such Assistant Attorney General, or came to the State of Oklahoma, they as such guardian petitioned the Probate Court of Ottawa County, Oklahoma, as required by the Act of May 27, 1902, for an order to sell the said lands in accordance with the laws of the United States, and that said order

was in each instance granted and made by the said court, and said Secretary of the Interior under and pursuant to said order of sale, offered for sale the interests of their said wards in said lands under the laws of the United States, all of which happened months before the defendant was ever appointed to the position of Special Assistant to the Attorney General of the United States, and months before he ever came to the country or heard of, or knew that there were any Quapaw Indian Lands.

VII.

Further answering, the defendant is constrained to say and show to the court that the persons whose names appear as plaintiffs in this suit are only nominally the plaintiffs; that the real plaintiffs are the persons who have signed their names to the complaint as Attorneys, and certain of their clients, against whom the defendant instituted suits and proceedings in the courts of the United States while employed by the Department of Justice, and who were by the defendant then and more recently checkmated in their cunningly devised schemes to acquire certain indian lands and mining rights by methods so unjust and so unconscionable as to call upon them the condemnation of every just man and woman to whom the facts became cognizant; and defendant alleges that this suit is brought by them in fulfillment of their threatens to so intimidate the defendant as to reter him from "future meddling in their affairs".

Defendant further alleges that the plaintiffs herein only permitted their names to be used as plaintiffs upon the solicitation and persuasion of these attorneys and their said clients, and then only upon a contingent basis, which the defendant alleges is in direct violation of the spirit and letter of the laws of the State of Oklahoma against champerty contracts and promotion of litigation.

And defendant further shows to the court that the allegations contained in the said complaint are so untruthful, particularly in things that are matters of public record, that the defendant is constrained to say that the same were inserted maliciously and with the intent to both injure the defendant and mislead the court.

VIII.

Further answering the complaint herein, defendant shows to this court that during the times mentioned in the complaint he was in no wise, or after any manner or fashion, officially connected with, or in the employ of the Department of the Interior of the United States; that as a

practicing Attorney-at-law, he was specially employed by the Attorney General of the United States in only one respect, to-wit: To institute and prosecute certain suits to set aside certain deeds commonly known as Marshal's Deeds, which had theretofore been unlawfully made by the United States Marshal under the direction of the Federal Court, unlawfully conveying the interests of heirs of deceased allottees in and to certain allotted lands located in Quapaw Indian Agency, and not otherwise, all as more fully appears by the letter of appointment under which the said defendant, Paul A. Ewert, was employed as Special Attorney of the Department of Justice, a copy of which said letter of employment, signed by Charles J. Bonaparte, Attorney General of the United States, is as follows:

"Department of Justice,
Washington, D. C.

October 23, 1908.

Paul A. Ewert, Esq.,
Pipestone, Minnesota.

Sir:

You are hereby appointed a Special Assistant to the Attorney General to assist in the institution and prosecution of suits to set aside deeds made to certain allotments in the Quapaw Indian Agency.

Your compensation will be at the rate of per month, commencing when you enter upon duty, at which time you should execute and forward the necessary oath of office.

Your official residence is fixed at Miami, Oklahoma, and when absent from that place on official business you will be allowed your actual necessary expenses of lodging and subsistence, and your actual traveling expenses, as provided by the Department's orders dated September 1, 1907, a copy of which is herewith enclosed.

This appointment is subject to any change which may be made by this Department.

Respectfully,

(Signed) CHARLES J. BONAPARTE,
Attorney General."

Further answering, said defendant says that under the terms of said employment, and not otherwise, he took the oath of office on or about November 10, 1908; that he continued his said employment under the terms of said appointment, and not otherwise, during the times mentioned in the complaint

30 herein. That during the times mentioned in complaint when said land was purchased, his employment consisted solely of instituting suits to set aside certain deeds, and no other litigation of any kind was instituted by him during that period.

IX.

Defendant, for further answer to the complaint herein, alleges and shows to the court:

That the lands here in controversy were allotted to Charles Bluejacket, an Indian of the Quapaw Tribe, under and pursuant to the Act of Congress approved March 2, 1895, being a part of the Indian Appropriation Act of the year 1895, (28 Stat., at large 927) providing for the allotment in severalty of the lands theretofore set apart for the use of the Quapaw Tribe or band of Indians, situated in Ottawa County, Oklahoma.

That prior to the 1st day of January, 1908, the said allottee, Charles Bluejacket, died, leaving as his heirs the persons named in the warranty deed, Exhibit "A", attached to this answer.

That on or about the 1st day of January, 1908, and nearly a year prior to the appointment of this defendant as Special Attorney for the Department of Justice, one Adelbert Hughes, a stranger to the defendant, who had theretofore acquired a mining lease upon the said lands and knew the value thereof, solicited the said heirs with a view to the purchase of said lands; that thereupon, the said heirs employed an attorney to prepare their petition to the Honorable Secretary of the Interior of the United States, asking him to sell the said lands under and pursuant to the Act of Congress approved March 27, 1902 (32 Stats., 245-275), providing for the sale of inherited Indian Lands.

That thereafter, to-wit: On the 25th day of January, 1908, the said minor heirs, William, Blanche, Anna, and Clyde Bluejacket, having the aforesaid purpose in view, petitioned the County or Probate Court of Ottawa County, Oklahoma, for the appointment of Carrie Bluejacket, their mother, as their guardian; that on February 8th, 1908, the said Probate Court appointed Carrie Bluejacket as said guardian and on said date issued to her letters of said guardianship.

31 That prior to said time L. A. La Falier had been duly and lawfully appointed the guardian of the person and the estate of Cora LaFalier and Louis Pascal, by the United

States Court in Probate in and for the Northern District of Indian Territory.

That on or about the 1st day of July, 1908, the said Carrie Bluejacket, as Guardian of William, Blanche, Anna, and Clyde Bluejacket, and L. A. LaFolier, as Guardian of Cora LaFolier and Louis Pascal, filed their petition in and with the County or Probate Court of Ottawa County, Oklahoma, for leave to sell the interests of their said wards in and to certain allotted lands, under and pursuant to the laws of the United States applicable to the sale of the said lands, to-wit: The Act of May 27, 1902 (32 Stats., 245-275) and the rules and regulations promulgated thereunder by the Secretary of the Interior of the United States; and at the same time, and coincident therewith, all of the heirs of the said Charles Bluejacket, deceased, filed with the said court their written consent to waive notice of the hearing of said petition to sell said lands, and consented that an order of sale as prayed for be made forthwith.

That thereafter, to-wit: On the 17th day of July, 1908, the said Probate Court of Ottawa County, Oklahoma, in due form of law, made and entered its order as prayed for by the said petitioners, ordering and directing that the said interests of the said minors and wards be sold as prayed for in said petition, in accordance with the laws of the United States and the rules and regulations promulgated thereunder by the Secretary of the Interior of the United States; which said petitions and orders were in each instance so made and filed as of said dates and are now of record in the office of the County Court of Ottawa County, Oklahoma.

That thereafter, all of the heirs of the said Charles Bluejacket, deceased, including the plaintiffs herein, in due form petitioned the Honorable Secretary of the Interior of the United States and the Superintendent in charge of Quapaw Agency, Wyandotte, Oklahoma, requesting the sale of the lands mentioned in the petition, the subject of this controversy, and other lands, and agreed in said petition to be governed by the rules and regulations of the Secretary of the Interior of the United States and the amendments thereto governing the sale of such lands and the control of the proceeds to be derived from said sale.

That upon the filing of the said petition asking for said sale, Ira C. Deaver, superintendent, and his appraisement official in charge, did visit and view said lands and examine and appraise same at its true value according to their best judgment and in accordance with the rules and regulations promulgated

y the Secretary of the Interior of the United States, and did make a certificate of appraisement and signed and sealed said appraisement and did not make the same public, and did not open same until the date of the sale, and did not, before or after said sale, make the same public; all of which occurred months before the defendant was ever appointed Special Attorney to prosecute certain land suits and before said defendant had ever heard of the Quapaw Indians, or knew that they had allotted lands.

That thereupon the said lands were duly advertised for sale by the Secretary of the Interior of the United States, as provided by law, and said lands with other lands, were publicly offered for sale by large published advertisements in the newspapers and by large posters such as are commonly used by the Department of the Interior in the advertising of its public lands, and by the mailing of said posters to possible purchasers and interested persons, until the date of the first sale, which said

First Sale was had on August 17, 1908, when the bids were opened, at which time the highest bid on said lands was made by one Adelbert Hughes, in the sum of Four Thousand Dollars (\$4,000.) and which said bid was rejected as being less than the appraised value of said land.

That thereafter, upon the further petition of the said heirs, and in the manner provided by law, the said lands were a Second Time in like manner offered for sale under date of September 21, 1908, at which time there were no bids received for said land.

33 In like manner, upon the petition of the heirs of the said Charles Bluejacket, deceased, the said lands were for a Third Time offered for sale under date of October 26, 1908, at which time there were no bids received for said land.

That thereafter, the said lands were for a Fourth Time offered for sale under date of November 27, 1908, at which time there were no bids received for said land.

That thereafter, in like manner, said lands were for a Fifth Time offered for sale under date of December 21, 1908, at which time the defendant, Paul A. Ewert, did offer and bid for said lands mentioned in the complaint, the sum of Four Thousand Dollars (\$4,000), but said bid was rejected because less than the appraised value of said land.

That thereafter, to-wit: On the 25th day of January, 1909, the said lands were for a Sixth Time publicly offered for sale to the highest bidder under and pursuant to the laws of the United States, at which time the defendant, Paul A. Ewert, bid the sum of Four Thousand Six Hundred and Eighty Dollars (\$4,680.) for said lands, which said bid was rejected because it was less than the appraised value of said land.

That thereafter, to-wit: On the 22nd day of February, 1909, the said lands were for a Seventh Time publicly advertised and offered for sale under the said Act of Congress and the rules and regulations of the Secretary of the Interior, at which time said defendant, Paul A. Ewert, bid the sum of Four Thousand Dollars (\$4,000.) for one hundred sixty (160) acres of said land, which said bid was rejected because it was less than the appraised value of said land.

That thereafter, to-wit: On the 29th day of March, 1909, the said lands were for the Eighth Time publicly advertised and offered for sale under the said Act of Congress and the rules and regulations promulgated thereunder, at which time this defendant bid on said lands against the public and all of the public, offering for the same the sum of Five Thousand Dollars (\$5,000.), which said bid was found to be above the appraised value of said land and was accepted by the Secretary of the Interior of the United States and was accepted by these plaintiffs with full knowledge of all the facts of the defendant's employment.

That thereafter, to-wit: On the 8th day of April, 1909, and on the 13th day of April, 1909, all of the said heirs, acting for themselves and for their wards, joined in the execution of a warranty deed to the defendant, wherein and whereby they conveyed to said defendant the lands mentioned in the complaint.

Defendant further shows to the court that after he had bid in said lands and before said deed was approved, the Commissioner of Indian Affairs of the United States, the Secretary of the Interior of the United States, and the Attorney General of the United States, were advised of his said acts, and the defendant personally conferred with each of them relative to the legality of his acts, and the propriety of his acts and the ethical side of his acts, and the said officials conferred with each other, and advised this defendant that they saw no objection to the act of the defendant in bidding upon the said lands at public sale to the highest bidder as against all other bidders who might possibly have wanted said land and had

an opportunity to purchase the same, and it was not in violation of his official duties, and each of the said officials recommended that the sale be approved, and thereupon, on the 19th day of July, 1909, the said deed was recommended for approval by the Commissioner of Indian Affairs of the United States and on the 26th day of July, 1909, the said deed was in all things approved by the Secretary of the Interior of the United States and by him returned to Ira C. Deaver, Superintendent and Special Disbursing Agent, for delivery to this defendant; and thereafter, the said deed was, by request of the plaintiffs herein made to Ira C. Deaver, Superintendent, delivered to this defendant and the full purchase price thereof paid by this defendant to the Secretary of the Interior of the United States, to be disbursed by him to the heirs of the said Charles Bluejacket, deceased, in accordance with the rules and regulations of the United States theretofore agreed upon between
35 the Honorable Secretary of the Interior of the United States and the heirs of Charles Bluejacket, deceased, including these plaintiffs.

And defendant further shows to the court that in all of his conduct herein in the purchase of said land, he acted in the utmost good faith, believing that he had a lawful right to bid upon the said lands at such public sale as against all other bidders who might desire to purchase same.

Defendant states that he did not enter into possession of the said lands until the crop season of 1910, by reason of the fact that said lands had theretofore been leased by the heirs of Charles Bluejacket, deceased, including these plaintiffs.

That between said time and the filing of the complaint herein, defendant expended more than One Thousand Dollars (\$1,000) in the form of permanent improvements upon said land by the erection thereon of necessary buildings, to-wit: A house, a granary, a chicken coop, a stable, a hay barn, and an out-house and other buildings, and by installing pumps to pump the necessary water; that he expended the further sum of One Hundred Dollars (\$100.) in the building of fences upon the said land; that he further improved the value of said lands and farm to the extent of at least Five Hundred Dollars (\$500.) by clearing off the stumps from said land and cutting off the brush and cutting off and destroying the tree sprouts which had overrun the said premises, and by the construction of drainage ditches and the reclaiming of much waste land, and by fertilizing it so as to make it productive, because at the time he obtained possession of it, the land had been cropped without fertilization for a period of thirty years and was

poor and in a run down condition and would not produce crops of corn and grain.

This defendant, making further answer to the allegation contained in the complaint herein that he has received large sums of royalty from the said lands, states that while he has received a small sum in the form of royalty, that he and his lessees in prospecting said lands and in attempting to mine the same and make it valuable for mining purposes, expended the sum of Fifty Thousand Dollars (\$50,000.) but were unable to find ore in paying quantities, and allege the fact to be that the land is not mineralized, and that it does not contain ore in paying quantities; and further says that in said operations defendant and his lessee lost at least Twenty-five Thousand Dollars (\$25,000.) by virtue of said operations so carried on in good faith.

Defendant further shows to the court that during the time that he has occupied said lands he has paid to the County of Ottawa, State of Oklahoma, taxes in excess of the sum of Five Hundred Dollars (\$500.), which taxes were duly and lawfully levied against the said lands and collected of this defendant.

Defendant, further answering, denies that the said lands were, at the time they were purchased by the defendant, of any other or a greater value than Five Thousand Dollars, but shows to the court that the question of the value of the lands at the time they were purchased by him is not within the issues of his case, because the Secretary of the Interior of the United States fixed the value of same; and defendant asks that no evidence be adduced in support of the contention of the plaintiffs that they were of a greater value, for the reason that such evidence would be incompetent, irrelevant and immaterial.

X.

Defendant admits that he purchased the said lands and that they were conveyed to him by the plaintiffs in this suit by an instrument of conveyance of which defendant's Exhibit "A" is a true and correct copy, but alleges and shows to the court that the said purchase was made by him in all things under and pursuant to the Act of Congress of May 27, 1902, providing for the sale of inherited Indian Lands, and pursuant to and in accordance with the rules and regulations promulgated thereunder by the Secretary of the United States, a true and correct copy of which said rules and regulations is hereunto attached, marked Exhibit "B" and made a part of this Answer, and not otherwise.

XI.

Further answering, the defendant shows to the court that these plaintiffs made, executed and delivered to the defendant their certain warranty deed, Exhibit "A", with full knowledge of all of the facts relative to the employment of the defendant and the manner in which the said sale was made through the Department of the Interior; and alleges that the said plaintiffs are therefore estopped at this time, by reason of their said conduct, from denying the validity of the said deed, and are estopped from attacking the same after any manner or fashion whatsoever, by reason of their own conduct in the premises.

XII.

Defendant, further answering, shows to the court that with full knowledge of all the facts and circumstances concerning the sale of said land to said defendant, Paul A. Ewert, as alleged, they yet executed and delivered to the defendant their warranty deed in and to said premises conveying the same to the said defendant, which said deed, to-wit: The deed of which Exhibit "A" is a copy, was made, executed and delivered on the 8th day of April, 1909, these plaintiffs delivered the said deed to the defendant and permitted him to enter into possession of the same and to occupy and enjoy it and be in possession thereof unmolested and without protest, up to the month of June, 1916, or nearly seven and one-half years; and said plaintiff stood by and saw this defendant improve the said land and erect thereon costly buildings and build fences and make other costly and permanent improvements upon said land and did not institute any suit or any legal proceedings whatsoever for the purpose of questioning the title of the defendant, or ousting him from possession, or setting aside the said deed of conveyance, until the institution of the suit in this case in the month of June, 1916; and defendant alleges that the plaintiffs are by their said conduct guilty of laches and estopped from at this time asserting or claiming any right, title or interest in and to said premises, or from instituting a suit to set aside the said conveyance or attempting to gain possession of the said lands by any manner whatsoever.

XIII.

As a further and separate defense herein, the defendant pleads and relies upon the statute of limitations of actions of the State of Oklahoma in bar of plaintiffs right to maintain the suit and recover, under said Section 4657 of the Revised

Laws of the State of Oklahoma of 1910, and shows to the Court that the plaintiffs herein have had both actual and constructive notice of all the facts relied upon by the plaintiffs in the Petition relative to the purchase of the said land by the said defendant, Paul A. Ewert, for more than five years previous to the commencement of this action, and for more than three years previous to the commencement of this action, and for more than two years previous to the commencement of this action, and defendant shows to the Court that these plaintiffs during all of the said five years have had actual knowledge of the fact that the said defendant did purchase the lands mentioned, in his own name, and that none of the said plaintiffs during said period of five years and of three years of two years previous to the commencement of said action were under any legal disability; and defendant prays that this said suit upon said grounds be dismissed as against this defendant, and that he be allowed to go hence and recover his costs herein.

Wherefore: Defendant demands judgment against the plaintiffs and each of them, that they recover nothing, and that their said suit be dismissed, and that the defendant have his costs and disbursements herein necessarily incurred.

38 And defendant further prays that in the event that this court shall hold that the purchase of the said lands by said defendant were unlawful, by reason of his employment as Special Attorney to prosecute certain land suits in Oklahoma, that it shall also find that in making the said purchase this defendant did so with the knowledge and consent and approval of the Commissioner of Indian Affairs of the United States, of the Secretary of the Interior of the United States, and of the Attorney General of the United States, and that it was therefore made in absolute good faith upon his part, and that for said reason, the said defendant, if he be required to re-deed the said premises and make due accounting of his use of the same, shall have offset against the value of the said land and the rental of the same, all sums of money in good faith expended by the defendant in the improvements on the said land as alleged in the answer, to-wit: The sum of One Thousand Dollars for buildings, etc.; One Hundred Dollars for fences, etc.; and Five Hundred Dollars for permanent improvements in clearing said lands from trees and stumps and brush and in the construction of drainage ditches, and for fertilizing the same so that said land became productive; and defendant further asks that there be offset against the said amount a sum of money as interest at the rate of eight per cent per annum on Five Thousand Dollars, the purchase price of the said land, from the

date of said purchase to the final determination of this suit; and defendant further asks for such other and further relief as to this court sitting as a court of equity may seem expedient and just.

PAUL A. EWERT

Defendant, Acting as His Own Attorney.
405-406 Frisco Building,
Joplin, Missouri.

39 State of Missouri,
County of Jasper—ss.

Paul A. Ewert, first being duly sworn, deposes and says that he is the defendant in the above entitled action; that he has read and knows the contents of the above and foregoing Answer, and that the statements contained therein are true, except as to those matters that are therein stated upon information and belief, and as to those matters, he believes it to be true.

PAUL A. EWERT

Subscribed and sworn to before me this 29th day of September, A. D. 1916.

(Seal)

W. D. LYERLE,
Notary Public, Jasper County, State of
Missouri.

My commission expires July 3, 1920.

40 Exhibit "A".

Indian Deed Inherited Lands.

This Indenture, Made and entered into this eighth day of April, one thousand nine hundred and nine, by and between Carrie Bluejacket as widow, Rose B. Daugherty and her husband, Edward Daugherty, Ida B. Holden and her husband, E. L. Holden, Walter Bluejacket, Edward Bluejacket and his wife, Delpha Bluejacket, Carrie Bluejacket as guardian of William Bluejacket, Blanche Bluejacket, Amy Bluejacket, and Clyde Bluejacket, minors, and L. A. LaFolier as guardians of Cora LaFolier, and Louis Pascal, minors, and L. A. LaFolier, as husband of Flora LaFolier, deceased, of Quapaw Indian Agency, Ottawa County, Oklahoma, heirs of Charles Bluejacket, Quapaw Allottee No. 16 of Quapaw Agency, Okla. deceased, a Quapaw Indian, parties of the first part, and Paul A. Ewert..... of Miami, Oklahoma, party of the second part:

Witnesseth, That said parties of the first part, for and in consideration of the sum of Five Thousand dollars, in hand paid, the receipt of which is hereby

acknowledged, do hereby grant, bargain, sell, and convey unto said party of the second part the following described real estate and premises situated in Ottawa County, State of Oklahoma, to-wit:

The East One Half of the South West Quarter of Section Thirty two (32); The South West of the South West Quarter fo Section Thirty two (32), in Township Twenty nine (29), North of Range Twenty four, East of the Indian Meridian, Oklahoma, and Lots Numbers One (1) and Two (2) of the North East Quarter of Section Five (5), in Township Twenty eight (28), North of Range Twenty four (24) East of the Indian Meridian, Oklahoma, in all containing Two Hundred acres, more or less, together with all the improvements thereon and the appurtenances thereunto belonging, and warrant the title to the same.

To have and to hold said described premises unto the said party of the second part, his heirs, executors, administrators, and assigns, forever.

In Witness Whereof, The said parties of the first part have hereunto set their hands and seals the day and year first above written.

Witnesses:

Wm. D. Hodgkiss.

B. N. O. Walker.

her mark

CARRIE X BLUEJACKET (Seal)

ROSA B. DAUGHERTY (Seal)

EDWARD DAUGHERTY (Seal)

IDA B. HOLDEN (Seal)

E. L. HOLDEN (Seal)

WALTER BLUEJACKET (Seal)

EDWARD BLUEJACKET (Seal)

DELPHA BLUEJACKET (Seal)

her mark as guardian

CARRIE X. BLUEJACKET (Seal)

41 for (WILLIAM BLUEJACKET (Seal)

(BLANCHE BLUEJACKET (Seal)

(AMY BLUEJACKET and (Seal)

(CLYDE BLUEJACKET (Seal)

L. A. LA FALIER (Seal)

as Guardian of Cora LaFalier and
Louis Pascal, minors

L. A. LA FALIER (Seal)

as husband of Flora La Falier,
deceased.

R. M. J. Shriver
J. LaFaliere

The above sign as witnesses
signature of L. A. LaFaliere
Guardian and as husband of
Flora Lafalier, deceased.

Superintendent's Acknowledgment.

Be It Remembered, That on this eighth day of April, 1909, before me the undersigned, Superintendent for the Quapaw Agency, Oklahoma, personally appeared Carrie Bluejacket, widow and heir, Rose B. Daughtery and her husband Edward Daughtery, Ida B. Holden and her husband E. L. Holden, Walter Bluejacket, Edward Bluejacket and his wife Delpha Bluejacket, and Carrie Bluejacket as Guardian for William, Blanche, Amy, and Clyde Bluejacket, minors; heirs of Charles Bluejacket, to me personally known to be the identical persons who executed the within instrument of writing, and such persons duly acknowledged the execution of the same as their free and voluntary act and deed for the uses and purposes therein set forth. I further certify that the contents, purpose, and effect of the deed of conveyance were explained to and understood by the grantors.

In Testimony Whereof, I have hereunto subscribed my name, officially, on the date last above written.

IRA C. DEEVER,
Superintendent.

State of Oklahoma,
County of Ottawa—ss.

Be It Remembered, That on this 13th day of April, A. D. 1909, before the undersigned, a Notary Public, in and for the County and State aforesaid, personally appeared L. A. LaFaliere as guardian for Cora La Faliere and Louis Pascal, minors, and as husband of Cora La Faliere, deceased, to me personally known to be the identical person who executed the within instrument of writing, and such person duly acknowledged the execution of the same as his free and voluntary act and deed for the uses and purposes therein set forth.

In Testimony Whereof, I have hereunto subscribed my name and affixed my Official seal on the day and year last above written.

Notarial Seal)

R. M. J. SHRIVER,
Notary Public.

My com. exp. Mch 26-1910.

42 State of Oklahoma,
County of Ottawa—ss.

Be It Remembered, That on this eighth day of April, A. D. 1909, before the undersigned, a Notary Public in and for the County and State aforesaid, personally appeared Carrie Bluejacket, widow, Rose B. Daugherty and her husband, Edward Daugherty, Ida B. Holden and her husband, E. L. Holden, Walter Bluejacket, Edward Bluejacket and his wife, Delpha Bluejacket, and Carrie Bluejacket as guardian for William Bluejacket, Blanche Bluejacket, Amy Bluejacket, and Clyde Bluejacket, minors, to me personally known to be the identical persons who executed the within instrument of writing, and such persons duly acknowledged the execution of the same, as their free and voluntary act and deed for the uses and purposes therein set forth.

In Testimony Whereof, I have hereunto subscribed my name and affixed my Official seal on the day and year last above written.

(Notarial Seal)

C. B. COE,
Notary Public.

My Commission expires Feb. 28th, 1912.

(Endorsed on back):

Department of the Interior,
Office of Indian Affairs,

Jul 19 1909, , 190

The within deed is respectfully submitted to the Secretary of the Interior, with the recommendation that it be approved.

R. W. VALENTINE,
Commissioner.

Department of the Interior,

July 26—, 1909.

The within deed is hereby approved.

FRANK PIERCE,
First Assistant Secretary.

Office of Indian Affairs,
Land Division.

Aug. 7—, 1909.

Recorded in Deed Book, Inherited Indian Lands, Vol. 22, page 127.

Approved—July 26-09.

FRANK PIERCE.

43 (Endorsed on back):

Office of Indian Affairs

Received

May 25 1909

File 40233

Warranty Deed

from

Carrie Bluejacket,
Rose B. Daugherty & husband
Edward Daugherty,
Ida B. Holden & husband
E. L. Holden,
Edward Bluejacket & wife
Delpha Bluejacket,
Carrie Bluejacket, guardian,
L. A. Lafallier, guardian
to
Paul A. Ewert.

44 (Exhibit B.)

(Amended Rules of Department of Interior for Conveyance of Inherited Indian Lands.)

(Dated October 2, 1902. Approved October 4, 1902. With the amendments approved by the Department September 18, 1903; November 5, 1903; March 21, 1905, and September 19, 1907, printed in italics).

For
Conveyance of Inherited Indian Lands.

To be observed in lieu of the rules heretofore approved in the conveyance of inherited land allotted to members of any tribe of Indians, for which trust or other patents have been issued with restrictions upon alienation, under the provisions of the Act of Congress approved February 8, 1887 (24 Stats., 388), or other act of Congress, or any treaty stipulation as authorized by section 7 of the act of May 27, 1902 (32 Stats., 245, 275), viz:

(The Act of Congress)

"That the adult heirs of any deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him may sell and convey the lands inherited from such decedent, but in case of minor heirs their interests shall be sold only by

a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the guardian, but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey a full title to the purchaser, the same as if a final patent without restrictions upon the alienation had been issued to the allottee. All allotted lands so alienated by the heirs of an Indian allottee and all lands so patented to a white allottee shall thereupon be subject to taxation under the laws of the State or Territory where the same is situate: Provided, That the sale herein provided for shall not apply to the homestead during the life of the father, mother, or the minority of any child or children."

1. (1) Owners of such inherited Indian lands desiring to sell the same may petition the Indian agent, or other officer having charge, within whose territorial jurisdiction the land is situated, praying that the land therein described may be sold under said act in accordance with the regulations, and agreeing that the proceeds to be derived therefrom shall be placed in one or more national banks, to be designated by the Commissioner of Indian Affairs, and which said banks shall furnish satisfactory bonds to guarantee the safety of such deposits, to the credit of each heir in proper proportion, subject to the check of such heirs, or, in case of minors, subject to the check of their recognized guardians, for amounts not exceeding ten dollars in any one month when approved by the agent or other officer in charge, and only when so approved, and for sums in excess of ten dollars per month upon the approval of such agent only when specifically authorized by the Commissioner of Indian Affairs. The petitions shall be signed by the lawful heirs, and, in case of minors, by their legal representatives, and shall set forth every material fact necessary to show full title under the laws applicable.

(2) When the land is not located within such jurisdiction the owners may petition the most convenient Indian agent, or other officer in charge of an Indian agency or Indian tribe, who shall take like action thereon as if the same were within the territorial limits of such agency or tribe.

(3). When such Indian agent, or other officer in charge, shall be satisfied that the facts alleged in the petition are sufficient, he shall cause a memorandum record of the same to be made in a book to be kept for that purpose and shall file the petition in his office. A copy of such petition shall
45 be immediately forwarded to the Commissioner of Indian Affairs by such agent or other officer in charge

who shall indorse thereon the date the same was received by him and the date the land described therein will be listed for sale. He shall on each Monday morning, post in a conspicuous place in his office in such large letters and figures as will be clearly legible, for a period of sixty days, a list of the lands described in the petitions received by him during the week preceding each such Monday, showing in separate columns the names of the owners, the descriptions of the lands, the dates when listed, and the date when bids will be opened, and such list shall be accessible to the public at all times in business hours of the office. On each Monday the Indian agent or other officer in charge will forward to the Commissioner of Indian Affairs a complete list of all lands posted in his office for sale.

(4). When any tract of land has been posted for sale, the Indian agent or other officer in charge shall visit, View And Appraise It At Its Value for the purpose for which it is best adapted, according to his best judgment. If such agent or officer is from any cause unable to personally appraise the lands, he shall require the appraisement to be made in like manner by the most competent officer or employee under his charge. A certificate of said appraisement signed by the person making it shall be sealed and not opened until the date of sale. The Appraisement Shall Not Be Made Public, Either Before Or After The Sale, and no bid for less than the appraised value shall be considered. If such agent or officer shall add a certificate of the qualifications and integrity of the appraiser, and that he believes the appraisement to be the value of the land.

(5). Bids will be received for inherited Indian lands up to 12 o'clock noon of the day upon which bids are advertised to be opened, at which hour they will be opened. Paragraph 5 of section 1 of the Amended Rules is amended in accordance herewith.

No bidder will be permitted to include more than one allotment in any bid. If a prospective purchaser desires to bid on more than one allotment he must submit a separate bid for each allotment which he desires to purchase, and if he wishes to purchase less than an entire allotment he may submit a bid for one or more legal subdivisions of such allotment.

(6) under no circumstances will the Indian agent or other officer in charge, or any person connected with an agency office, be permitted to prepare any bid or assist any prospective bidder in preparing his bid.

Each bid must be accompanied by a duly certified check on some solvent bank, payable to the Commissioner of Indian Affairs, for the use of the grantors, for 25 per cent of the amount offered, as a guaranty for the faithful performance by the bidder of his proposition. If the bid shall be accepted and the successful bidder shall, within a reasonable time, after due notice, fail to comply with the terms of his bid, such check shall be forfeited to the use of the owner of the land.

All such bids shall be inclosed in a sealed envelope, which must be marked by the bidder "Bid for inherited land".

In the advertisements concerning the sale of inherited Indian lands notice will be given to the effect that the sealed envelope containing bids should not have noted thereon descriptions of the lands to which the bids relate, but that there shall be noted on such envelopes the dates upon which the same are to be opened.

46 (7). The right to reject any or all bids is reserved, and bids will only be accepted by such agent or other officer, Subject To The Approval Of The Owner Of The Land.

(8). Purchasers shall pay all costs of conveyancing and, in addition, the following sum, to-wit: If the purchase price is one thousand dollars or less, \$1.50; if it be more than one thousand dollars and less than two thousand, \$2; and where the purchase price is more than two thousand dollars, \$2.50; to be used by the Commissioner of Indian Affairs for giving due public notice of the sale as herein provided.

(9). Bidders and other interested persons may be present when bids are opened. When opened, the bids shall be so recorded in a book to be kept for that purpose as to show name of bidder, description of land, amount offered, and action taken thereon.

(10). Lands not disposed of at the appointed time may, if the owner so desires, be relisted and offered for sale after thirty days' advertisement, under the same rules governing their original listing.

(11). The Commissioner of Indian Affairs shall cause an advertisement to be published in some local paper of general circulation in the section of the country in which lands authorized to be listed are located, and such other newspaper as he may deem advisable, by which the public will be informed that inherited Indian lands within the lim-

its of the agency, offered for sale under the act of May 27, 1902, will be publicly listed at the agency, where sealed proposals for any tract of the list will be received during the sixty days following the date when the same was listed, in accordance with regulations which may be had on application, in person or by letter, to the agent or officer in charge.

A list of the lands offered for sale will be published in the weekly edition of the newspaper of widest circulation in the county in which such lands are situated, such list to be corrected on Monday of each week, adding thereto such other lands as may have been listed and removing therefrom such lands as may have been sold during the prior week.

Agents or other officers in charge will, on request, furnish a list of all lands offered for sale to anyone making application therefor.

The agent or other officer in charge shall not incur indebtedness for promulgating notices of sale of inherited Indian lands in excess of the amount of fees collected, as authorized by paragraph 8 of section 1 of these amended rules, or the payments made by petitioners for the sale of such lands for the more extensive advertising thereof; but any petitioner, with the consent of such officer and on depositing with him the necessary fees, may cause notices of the proposed sale to be published in such papers as he may select. Agents and other officers in charge may, when it appears that the interest of the petitioners will be benefited thereby, require them to deposit five dollars to defray the cost of giving wider notice of sale. Larger deposits will not be required without specific authority from the Commissioner of Indian Affairs.

III. Such deed or instrument of conveyance, when submitted for the Secretary's approval must be accompanied by the original petition, the appraisement, all bids and checks relating to the lands covered by such deed, and a full report by the agent or other officer in charge of all proceedings previous to the execution of the deed: also—

47 (1). By a certificate signed by two members of a business committee, if there be such, or by at least two recognized chiefs, or by two or more reliable members of the tribe, setting forth that the allottee to whom the land was originally allotted is dead, giving as nearly as possible the date of death. Such certificate shall also show the names and ages of the heirs, adults and minors, of such deceased allottee, but the Department reserves the right to require, if in its judgment it shall be considered necessary, such fur-

ther and additional evidence relative to heirship as may be deemed proper. If the persons who certify to the death of the allottee are, from their own knowledge, unable to certify as to who are the heirs (with their names and ages) of such deceased allottee, an additional certificate made by persons of one of the three classes herein specified, showing who are the heirs and giving their names and ages (adults and minors) must be furnished.

(2). By a certificate from the Indian agent, superintendent of school, or other officer having charge of the Indian tribe, that the contents, purport and effect of the deed of conveyance were explained to and fully understood by the grantors; that the consideration specified in the deed is a fair price for the land; that the same has been secured to be paid to the grantors in lawful money of the United States; and that the conveyance is in every respect free from fraud or deception; and that said allottee did not reside upon his homestead or allotment, nor cultivate the land sold during his lifetime and immediately preceding his death. If the allottee did reside upon such land, then it must be shown of whom the family of the deceased allottee consisted, their ages, and relation to said deceased allottee, in order to determine whether it is a case in which a sale is authorized under the said act of May 27, 1902.

(3). The consideration money must in no case be paid to the grantors; but a certificate from the cashier, or other officer, of some reputable bank, or, in case there is no bank convenient, from a United States Indian agent, showing that the stipulated price named in the deed for the land has been deposited in such bank, or with such agent, as the case may be, to be paid to the grantors or their order, upon the presentation of the deed duly approved by the Secretary of the Interior, or by the President, must accompany such deed.

(4). When the deed is acknowledged before an officer other than an Indian agent or superintendent, it must be accompanied (in lieu of the certificate of the Indian agent in other cases required) by a certificate of the officer taking the acknowledgment as to the facts required to be certified by the Indian agent; or, if such facts shall not be known, to such officer, they must be verified by the affidavits of at least two credible disinterested persons who are cognizant of these facts, whose veracity must be certified by such officer.

(5). Where these rules specify two or more officers or other persons to perform certain duties, preference must,

in all cases, be given to such officers or persons in the order named.

(6). The affidavits of the grantors and the grantees must accompany such deed, showing that there is no contract, agreement, nor understanding (written or verbal) whereby the consideration money or price paid for the land, or any portion thereof, is to be refunded to the purchaser after the approval of the deed; nor any live stock, implements, other article, or thing are to be exchanged or taken in lieu of said consideration money or purchase price, or any portion thereof, for such land. Each deed must be accompanied by an affidavit of the grantee, stating that he is not a party to any association or combination of persons to acquire lands under said law at less than their fair value or to prevent open and fair competition in the purchase and sale of lands; that he is not directly or indirectly connected with or interested in any devise, scheme, or plan to prevent or interfere with fair competition in the purchase of such lands or to secure them at less than their fair market value, and that the contract under which the deed presented for approval was executed was not procured through or by means of any such plan or scheme; that such contract was not secured through false representations to the grantor, or suppression of facts as to the value of the land or as to any other feature of the transaction, and that neither the grantor, nor anyone acting for him or in his place, has been given or promised any money or other thing by the grantee, or by anyone with his advice, consent, or knowledge, except the consideration named in the deed, to induce him to agree to such sale of his land.

(7). The testimony and all papers pertaining to the conveyance must be properly authenticated under seal, and in all other respects the conveyance must conform to these rules.

IV. When the land conveyed, or any part thereof, is less than a legal subdivision, or does not conform to the public survey, a diagram prepared by a competent surveyor, or an authenticated copy of the official plat of survey indicating all the land intended to be conveyed, and all former sales by the grantors or allottees, must be furnished for the use of the Indian Office.

V. No deed of conveyance for an undivided interest in any tract of land will receive approval. All the heirs of a deceased allottee must unite in one deed conveying their entire interest in the land. If the land of a deceased allottee has been partitioned among his or her heirs any such heir

may sell the portion set off to him in and by such partition. Where there have been court proceedings, a certified copy thereof must accompany the deed.

VI. If in the case of any deceased allottee there shall have been or shall hereafter be probate or other court proceedings establishing who are the heirs of such deceased allottee, a certified copy of the final order, judgment, or decree of the court, showing and determining such heirship, must be furnished; but where such court proceedings have not been had a compliance with the requirements of the provisions of paragraph 1 of section III of the rules as amended will be deemed sufficient to establish the heirship.

In all cases the probate judge, or officer having probate jurisdiction, is respectfully requested and urged, in taking the bond of guardian, to require such guardian to give a trust and guarantee company, wherever practicable, as surety.

VII. A form of deed of conveyance has been prepared and printed for gratuitous distribution by the Indian agent, superintendent, or other officer in charge of the Indian tribe, which must be used or conformed to in all cases of transfer of inherited Indian lands.

No Proceeding or Action Under These Regulations Shall Effect in Any Respect the Right of the Secretary of the Interior to Exercise the Discretion Given Him by Law Relative to Approval of Deeds for These Lands.

C. F. LARRABEE,
Acting Commissioner of Indian Affairs.

Approved September 19, 1907.

G. W. WOODRUFF,
Acting Secretary.

(Capitals and Italics are Ours)

49 Endorsed: Answer, filed in the U. S. District Court,
September 30, 1916.

(Order of Submission, March 15, 1917.)

Before Judge Campbell, at Vinita, Oklahoma.

Now on this 15th day of March, 1917, this cause comes on for trial and the Complaint having been amended by [inter-
mineation] by leave of Court, and the Court having heard
the evidence offered and oral argument of counsel.

It is ordered that this cause be and the same is hereby submitted upon the record, argument and briefs, the Complainants to have twenty days to file their brief, the defendant to have ten days thereafter to file his brief, and the Complainants to have five days thereafter to file reply brief.

It is further ordered that the reporter transcribe the testimony offered, the cost to be finally taxed as costs in the case.

51 (Plaintiffs' Motion to Set Aside Submission of Cause.)

(Filed in the U. S. District Court, June 4, 1917.)

Come now the plaintiffs herein, and move the Court to set aside the order of submission of this cause to the Court for final decision and judgment, and permit the plaintiffs to amend their petition herein, so as to charge that the deed executed by these plaintiffs to the defendant, as aforesaid, when submitted to the Honorable Indian Commissioner and the Honorable Secretary of the Interior, for their approval, was the subject of much discussion as to the right and propriety of the defendant to purchase said Indian lands, and the said deed was disapproved by the Indian Commissioner, and the [ten] Secretary of the Interior; that, thereafter, the said Secretary of the Interior did approve said deed, on the representation and statement of this defendant and the Honorable Attorney General that the said defendant herein had purchased no other lands in the Quapaw Agency, Oklahoma, and would not purchase any lands in the future from said Indians, and said approval was obtained and given with the express condition that said defendant had not purchased other lands or lands within said Agency and would not attempt to purchase lands within said agency from said Indians; That said approval was obtained by said defendant by falsely making said representations, as aforesaid, to said Secretary of the Interior, and the Honorable Indian Commissioner, and by deceiving said officials and concealing from them the fact that the said defendant had, prior to the time of the final approval of the deed herein mentioned, purchased from one George Redeagle, in the name of Franklin M. Smith, as a dummy, and for the sole use and benefit of this defendant, one hundred acres of land located in said agency, described as follows, to-wit:

The East Half of the Southeast Quarter and the East Half of the Southwest Quarter of the Southeast Quarter of Section twenty one (21), Township twenty-nine (29), North,

Range twenty-three (23) East of the Indian meridian, Ottawa county, Oklahoma, containing in all 100 acres; and which said fact was fraudulently concealed by defendant;

That said Redeagle deed was approved by the Honorable Secretary of the Interior on the 30th day of April, 1909, and such approval was obtained by concealing from said Secretary of the Interior the fact that the said Paul A. Ewert, defendant herein, was the real purchaser, and further that said approval of the deed made by the plaintiffs herein was obtained by fraud upon the said Department and same would not have been made if the said Secretary of the Interior had

known the facts as herein stated, that the defendant
53 had secured the approval of the deed of George Redeagle to Franklin M. Smith by concealing from the Interior Department the fact that the defendant and not Franklin M. Smith was the purchaser of said Redeagle land; that the affidavit of Franklin M. Smith as grantee in said conveyance, stating that no false representations had been made to the grantor and that there had been no suppression of facts as to the value of the land or as to any other feature of the transaction, was in fact false and untrue, in that the said Franklin M. Smith and this defendant did conceal from the Interior Department the fact that Paul A. Ewert was the real purchaser of said property; That said false affidavit was evidence upon which the Interior Department acted in approving the said Redeagle deed, and, if the Interior Department had known that said Ewert and said Franklin M. Smith had thus fraudulently secured the approval of the said Redeagle deed, the deed of these plaintiffs would not have been approved.

Plaintiffs aver that this application is made in good faith and in order to prevent a miscarriage of justice in this cause and to the end that this Court may have before it and consider all the facts affecting the rights of these plaintiffs, and not for the mere purpose of obtaining a delay in the final disposition of the cause, the plaintiffs with this motion submit an amended petition which they offer to file.

Plaintiffs also submit and exhibit to the Court the following evidenciary matters that the Court may see the probabilities of the plaintiffs proving the allegations of their said amended petition, viz:

1. A certified copy of the affidavit of Franklin M. Smith, Grantee, filed with the application to have the Redeagle deed approved, which said affidavit is in words
54 and figures as follows, viz:

"Affidavit of Grantee.

United States of America,
State of Oklahoma,
County of Ottawa—ss.

Franklin M. Smith, grantee in a certain deed for the conveyance of Inherited Indian lands therein described, to-wit:

The East half of the South-east quarter and the East half of the South-west quarter of the South-east quarter of section twenty-one, township twenty-nine north or Range twenty-three East, containing one hundred acres, is conveyed by George Redeagle and his wife, Minnie Redeagle, heirs of Huldah Quapaw White, deceased Quapaw allottee, Number 24, grantors; Franklin M. Smith, grantee, being first duly sworn upon oath says:

That there is no contract, agreement, nor understanding (written or verbal) whereby the consideration money or price paid for the land, or any portion thereof, is to be refunded to the purchaser after the approval of the deed; nor any live-stock, implements, or other article or thing are to be exchanged or taken in lieu of said consideration money or purchase price, or any portion thereof for such land; that he is not a party to any association or combination of persons to acquire lands under said law at less than their fair value or to prevent open and fair competition in the purchase and sale of lands; that he has not directly or indirectly connected with or interested in any device, scheme, or plan to prevent or interfere with fair competition in the purchase and sale of lands; or to secure them at less than their fair market value, and that the contract under which the deed presented for approval was executed was not procured through or by means of any such plan or scheme; that such contract was not secured through false representations to the grantors, or suppression of facts as to the value of the land or as to any other feature of the transaction, and that neither the grantor, nor anyone acting for them or in their place, has been given or promised any money or other thing by the grantee, or anyone with his advice, consent, or knowledge, except the consideration named in the deed, to induce them to agree to such sale of said land.

FRANKLIN M. SMITH.

Subscribed and sworn to before me this 16 day of March, A. D. 1909.

CHAS. A. BECK,
Notary Public.

My Com. Expires Apl. 6, 1912."

55 2. A certified copy of an official letter showing the disapproval of the plaintiffs' deed, which said letter is of the tenor following, viz:

"Department of the Interior

Office of Indian Affairs
Washington.

July 19 1909

Land-
Sales
55214-1909
40233- "
55652- "
E S S

Sales of allotment of
Charles Bluejacket.

The Honorable,

The Secretary of the Interior.

Sir:

On May 1, 1909, the Superintendent of the Quapaw Agency forwarded an inherited Indian land deed executed by the heirs of Charles Bluejacket, conveying to Paul A. Ewert for \$5000, 200 acres of land in Ottawa County, Oklahoma.

Mr. Ewert is a Special Assistant to the Attorney General, detailed by the Department of Justice to examine the legality of titles of Quapaw Indian lands, and is now engaged in this capacity.

The case has been carefully investigated and it appears from the papers in the case that Mr. Ewert acted within the law and there is no suspicion of fraud in the transaction. The appraised value of the land described in the deed is \$4900. The tract has been advertised and readvertised a number of times, but in each case the bids did not equal the appraisal.

The Indian Office has prohibited any of its employees from purchasing Indian lands or dealing with Indians in their per-

sonal capacity, and it is believed that in the interest of good administration and in harmony with an order issued by the Department on June 29, 1909, that this deed should be disapproved and the land readvertised. All the papers in the case are inclosed for your consideration, and attention is invited to the letter from Mr. Ewert, dated July 10, 1909, addressed to Hon. Franklin Pierce, Assistant Secretary of the Interior. It is respectfully recommended that the deed be disapproved.

56

Very respectfully,

R. G. VALENTINE,
Commissioner.
E. P. H.

OGP-15
3173

The within deed is disapproved and is returned.

FRANK PIERCE,
First Assistant Secretary."

3. A certified copy of an official letter of the Interior Department, dated June 26, 1909, which is of the tenor following, viz:

"Land-
Sales
40233-1909
E S S

Inherited Indian land
deed to Paul A. Ewert.

6/26/09

The Attorney General,

Sir:

On May 1, 1909, the Superintendent of the Quapaw Agency forwarded an inherited Indian land deed executed by the heirs of Charles Bluejacket, conveying to Paul A. Ewert, for \$5000, 200 acres of land in Ottawa County, Oklahoma.

Mr. Ewert is an employee of your Department, detailed by the Department of Justice to examine the legality of titles of Quapaw lands.

The matter is referred for your consideration, and the deed will be held in the Indian Office pending your advice.

Very respectfully,

(Sgd) FRANK PIERCE,
First Assistant Secretary.

ED-19
2462"

4. A certified copy of a letter to the Interior Department, dated July 10, 1909, which said letter is of the tenor following, viz:

57 "Department of Justice, Washington.

Miami, Okla. July 10th, 1909.

Hon. Franklin Pierce,
Asst. Secy. of the Interior,
Washington, D. C.

Dear Sir:

In connection with the Deed of the Heirs of Charles Blue-jacket to [mee], before you for approval, I wish to submit the letter written by me to the Hon. Attorney General, in connection therewith. It fully explains my position in the matter. I invite the fullest inquiry in the matter, because if made I am sure that it will resolve itself in my favor.

I do not particularly care for the land, but Mr. Pierce, I am sensitive about having the deed Disapproved by you, because I do not feel that I have acted otherwise than within the law in the matter, and a disapproval might lend credence to a rumor that might be started to that effect.

I hope that you will call for all the papers that ought to accompany the report of the Agent to the Commissioner of Indian Affairs. I am not in the business of buying these lands, and saw no reason why I might not bid at such a public sale.

I believe that it would be indiscreet to continue the buying of these lands, and do not intend to do so.

Yours Truly,

PAUL A. EWERT."

5. An official letter of Hon. Walter S. Fisher, Secretary of the Interior, to Hon. James S. Davenport, Congressman from the District in which this land is situate, dated June 8, 1911, one paragraph of which is of the tenor following, viz:

"In this connection it may be observed that Mr. Ewert is not an employee of the Indian Office, and in strictness was within his legal rights in bidding on the land in question. There has been no sale to Mr. Ewert of any Indian land other than the Charles Bluejacket allotment, of which this Department is aware, and no bids have been received from him since the approval of that sale."

6. A certified copy of the defendant as grantee, filed with his application to have the deed at issue approved, the said affidavit is in words and figures following, viz:

58

Affidavit of Grantee.

United States of America,
State of Oklahoma,
County of Ottawa—ss.

Grantee in a certain deed for the conveyance of Inherited Indian land, whereby certain land therein described, to-wit: E/2 of the SW/4 and the SW/4 of the SW/4 of Sec. 32, Twp 29, and Lots Nos. 1 & 2 of the NE/4 of Sec. 5, Twp. 28, all N. of R. 24. Section township range is conveyed by Carrie Bluejacet, Rose B. Daugherty, Ida B. Holden, et al., grantors, to Paul A. Ewert, grantee, being first duly sworn, upon oath say: That there is no contract, agreement, or understanding, (written or verbal) whereby the consideration money or price paid for the land, or any portion thereof, is to be refunded to the purchaser after the approval of the deed; nor any livestock, implements, or other article or things are to be exchanged or taken in lieu of said consideration money or purchase price, or any portion thereof for such land; that he is not a party to any association or combination of persons to acquire lands under said law at less than their fair value or to prevent open and fair competition in the purchase and sale of lands; that he is not directly or indirectly connected with or interested in any device, scheme, or plan to prevent or interfere with fair competition in the purchase of such lands or to secure them at less than their fair market value, and that the contract under which the deed presented for approval was executed was not procured through or by means of any such plan or scheme;

that such contract was not secured through false representations of the grantors, or suppression of fact as to the value of the land or as to any other feature of the transaction, and that neither the grantors nor anyone acting for them or in their place, have been given or promised any money or other thing by the grantee, or anyone with his advice, consent, or knowledge, except the consideration named in the deed, to induce them to agree to such sale of their land.

PAUL A. EWERT.

Subscribed and sworn to before me this 13th day of April,
A. D. 1909.

R. M. J. SHRIVER

Notary Public.

My com exps. Mch 26—1910.”

Note:—Paragraph six of Rule three, provides that:

“Each deed must be accompanied by an affidavit of the grantee, stating that he is not a party to any association or combination of persons to acquire lands under said law at less than their fair value or to prevent open and fair
59 competition in the purchase and sale of lands; that he is not directly or indirectly connected with or interested in any device, scheme, or plan to prevent or interfere with fair competition in the purchase of such lands or to secure them at less than their fair market value, and that the contract under which the deed presented for approval was executed was not procured through or by means of any such plan or scheme; that such contract was not secured through false representations to the grantor, or suppression of facts as to the value of the land or as to any other feature of the transaction, and that neither the grantor, nor anyone acting for him or in his place, has been given or promised any money or other thing by the grantee, or by anyone with his advice, consent, or knowledge, except the consideration named in the deed, to induce him to agree to such sale of his land.”

7. A certified copy of an official letter of the Indian Department, dated December 20, 1909 of the tenor, following, viz:

Department of the Interior, Pierce.
Washington.

December 20, 1909.

My dear Mr. Attorney-General:

I thank you for your letter of the 4th instant in which you enclose a copy of the report to you of W. R. Benham, Special

Agent of your Department, on the purchase by Mr. Paul A. Ewert, a Special Assistant Attorney of your Department, of an allotment of land belonging to a Quapaw Indian in the State of Oklahoma. Mr. Ewert bought this land for \$5,000, while Mr. Benham reports its actual value at \$15,000 at the time he purchased. The great discrepancy between the value of the land and the price paid would seem to indicate fraud on the part of Mr. Ewert. Do you not think that the facts present a case strong enough for your Department to institute proceedings to set aside the deed to Mr. Ewert. It seems to me that this ought to be done.

I have referred Mr. Benham's report to the Indian Office and directed an investigation to determine the good faith and ability of our agent at the Quapaw Agency.

Very respectfully yours,

R. A. BALLINGER,

Secretary.

Hon. George W. Wickersham,
Department of Justice.

8. A certified copy of an official letter of the Interior Department, dated December 20, 1909, to the Commissioner of Indian affairs, the tenor of which is as follows, viz:

60 Department of the Interior.
Washington.

Pierce.

December 20, 1909.

The Commissioner of
Indian Affairs.

Sir:

Herewith is a letter from the Attorney-General, dated December 4th, transmitting copy of report by Special Agent Benham of that Department respecting the purchase by Mr. Paul A. Ewert, Special Assistant Attorney of the Department of Justice, of the Charles Bluejacket land in the Qualaw Agency. I also enclose copy of my reply to the Attorney-General.

I wish a most careful and exhaustive examination to be made into this case, and also the good faith and ability of the present agent at the Quapaw Agency. If it be true that our agent is at fault in these matters, I wish to know it so that he

may be summarily dealt with. After a careful investigation of the matter, kindly report to the Department.

Very respectfully yours,

R. A. BALLINGER,
Secretary."

9. A certified copy of an official letter of Defendant, Ewert, to the Secretary of the Interior, of the tenor following, viz:

"Paul A. Ewert
Attorney and Counsellor at Law
Miners Bank Building
Joplin, Missouri

April 5, 1913.

The Hon. Secretary of the Interior,
Washington, D. C.

Dear Sir:—

I enclose to you herewith special warranty deed from Grace Sacto Walker, formerly Grace Redeagle Sacto, and John Walker, her husband, to me, asking that you approve the same. In explanation thereof, permit me to say that the 100 A tract of land in question is one that was originally, to-wit in 1909, sold to Franklin M. Smith, and thereafter, to-wit, purchased from Franklin M. Smith by the undersigned. The original sale from George Redeagle and Minnie Redeagle, his wife, to Franklin M. Smith was made under the act of 1902, providing for the sale of inherited Indian land and pursuant to the rules and regulations of the Secretary of the Interior. If you will examine the files relative to the original sale, you will find there a certified copy of the final decree of the United States Court in and for the northern district of Indian Territory, sitting at Miami, showing that the estate of Huldah Quapaw White was in due form of law, probated in the United States Court for the northern district of Indian Territory, and that pursuant to such action, Grace Sacto and George Redeagle were found to be the lawful heirs of Huldah Quapaw White.

In further explanation, it may be said that the United States does not hold the Quapaw lands in trust, but they have deeds to their lands in fee simple, solely with a restriction upon alienation for the period of 25 years.

Recently I tried to procure a loan upon the land in question, but the Loan Company desires that I should procure a

quit claim deed from the other heir to Huldah Quapaw White, and I therefore procured the same and offer it to you for your approval. The Loan Companies are, as you know, great sticklers in the matter of titles, and before they will approve the loan, they must have the quit claim deed in question.

Will you do me the great favor to act upon this matter at once? It is purely a matter of form and there ought to be no occasion for delay. In any event, it will be a great accommodation to me if the Honorable Secretary will at once give this matter his consideration and approve the deed. It probably will be necessary to call for the files in this case so as to show that the prior sale of the land in question is in due form and regular.

Won't you please do me the favor to hurry this matter through, because I am waiting for it.

As above stated, I enclose herewith an original deed from George Redeagle to Franklin M. Smith, and the deed from Franklin M. Smith to me, together with a copy of the final decree in this case. Be kind enough to return these instruments to me.

Yours truly,

PAE''

PAUL A. EWERT.

10. A certified copy of a letter of this defendant to the Interior Department, dated May 5, 1913, of the tenor following, viz:

"Paul A. Ewert
Attorney and Counsellor at Law,
Miners Bank Building,
Joplin, Missouri.

May 5, 1913.

Mr. Franklin K. Lane,
Washington, D. C.

Dear Sir:—

Under date of April 13, 1913, I wrote the Department a letter enclosing a quit claim deed from Grace Sacto Walker to myself, asking for the approval of the same at an early date. The quit-claim deed was only a matter of form and arose out of the following state of facts:—

62 In April, 1909, there was sold, under the Act of 1902 permitting the sale of inherited Indian lands and pursuant to the rules and regulations of the Secretary of the In-

terior, a certain tract of land, to-wit, 100 acres to one Franklin Smith. The sale was made, the deed approved by the Secretary of the Interior and it was regular in every form, being a portion of the land inherited by George Redeagle from Huldah Quapaw White. In due form of law, the Federal Court of Indian Territory found the heirs and partitioned the 200 acre allotment of Huldah Quapaw White between George Redeagle and Grace Redeagle Sacto, his sister and the sole other heir. George Redeagle sold his 100 acres to Franklin Smith as above alleged. Thereafter I purchased the land of Franklin Smith and sometime ago I endeavored to procure upon it a farm loan from the Parker-Wise Investment Company of Vinita. These Loan Companies, as you know, are sticklers on title and before approving the loan suggested that I procure from Grace Sacto Walker a quit-claim deed to this 100 A tract in question, which had been set aside to George Redeagle as one of the heirs, by the Federal Court.

The Department at that time recognized the proceedings, and ordered the sale to be made and approved the deed to Franklin Smith, which, in my judgment, was perfectly lawful and proper in every respect, but the Loan Company insists upon having this quit-claim deed from Grace Sacto Walker, the other heir. It is purely a matter of form, Grace Sacto Walker having no legal title to the 100 A in question. With the letter of explanation, I enclosed the deed from Grace Sacto Walker, to myself, together with the deed of the Department to Franklin Smith and Franklin Smith's deed to me.

This was on April the 5th, and yet the Department has never acknowledged receipt of this communication. The Loan Company is holding up the money until the deed arrives. For this reason, on the 10th day of April, I wired the Department again, asking as a special favor that they hurry the matter along, and yet no answer or acknowledgment of any kind. On April 17th, 1913, I again addressed another letter to the Department, calling attention to my letter of April 15th, my telegram of April 10th, and yet I have not even received an acknowledgment of the receipt of any of these communications.

You will do me a great favor, Mr. Lane, if you will take this matter up with your appointees who have the matter in charge. It is working a great inconvenience to me, because the Loan Company is holding up the money, waiting for the approval of the Department of the deed in question. I have obligations dependent upon receipt of this money long be-

fore this, and it has embarrassed me in no small way.
3 It was my experience in the Department, while special
assistant to the Attorney General, that it took about
three weeks to work any kind of a letter through the De-
partment, but surely this matter of mine ought not to have
consumed a full month, and surely someone in the Depart-
ment should have shown me the courtesy before this of hav-
ing acknowledged receipt of my several communications.
Won't you do me the great favor, Mr. Secretary, of pushing
his matter along?

Yours truly,
PAE''

PAUL A. EWERT.

11. A certified copy of the letter to the Assistant Com-
missioner of Indian Affairs, dated May 9, 1913, of the tenor
following, viz:

Paul A. Ewert
Attorney and Counsellor at Law
Miners Bank Building,
Joplin, Missouri,

May 9, 1913.

Mr. F. H. Abbott,
1912 Euclid St.,
Washington, D. C.

Dear Mr. Abbott:—

I am writing to ask you to do me a favor—one that is not
inconsistent with your official duties.

On April 5, 1913, I addressed a letter to the Secretary of
the Interior enclosing a quit claim deed from Grace Sacto
Walker to myself, covering a 100 A tract of land which had
theretofore been purchased from George Redeagle, one of the
heirs of Huldah Quapaw White, a deceased Quapaw allottee.
The 100 A was purchased about four years ago by one Frank-
lin Smith from George Redeagle at the government sale, and
thereafter I purchased the land from Mr. Smith. The 100
A tract is one half of the 200 A allotment of Huldah Quapaw
White, Quapaw allottee No. 2.

With the quit claim deed, I enclosed to the Department the
original deed from George Redeagle to Franklin Smith, a
deed from Franklin Smith to me and the quit claim deed
from Grace Sacto Walker, the sister of George Redeagle, to
myself.

The sale of the 100 A tract of the George Redeagle land to Franklin Smith was made and the deed approved in April, 1909. The sale was made in accordance with the rules and regulations of the Department.

About two months ago I endeavored to get a loan on this land from a Loan Company. These Loan Companies, as you know, are sticklers about titles, and said they preferred that I get a quit claim deed from the other heir. The Federal Court for the northern district of Indian Territory, 64 had some years before this date the sale, in a lawful proceeding, declared Grace Redeagle Sacto and George Redeagle, her brother, to be the sole heirs of Huldah Quapaw White, and divided the land between them, half and half. On the strength of that decree and partition, the land set off to George Redeagle, to-wit, the 100 A tract in question, was sold to Mr. Franklin Smith.

All I ask now is the approval of the quit claim deed to this same tract of land, made by Grace Sacto Walker to myself, in order to have the land approved by the Loan Company, the Parker-Wise Investment Company of Vinita, Oklahoma. The first letter with the enclosures, was written April 5, 1913. On April 10th, I wired the Secretary, asking him as a personal favor, to hurry this matter along, but I heard nothing from that. On April 17th, I again wired the Secretary calling attention to the letter and telegram and asked that the matter be hurried along, but I have heard nothing from that. I take it that my communications have been mislaid or pigeonholed, and therefore write you, asking if you will not do me a personal favor and look into this matter and see where it is asleep.

I have been [convenienced] in this matter by the delay a great deal. I try to arrange my financial affairs in a business-like way and depended upon this loan, but the Loan Company refuses to turn over the money until the quit claim deed is procured. There is no reason in the world why this deed should not have been approved and returned to me long ago. It is the deed of an heir of Huldah Quapaw White, voluntarily given in order to clear up the title, or at least make it satisfactory to the Loan Company. The original sale was made on the strength of the Federal Court proceedings, determining the heirs and dividing the 200 A tract equally between the two heirs, Grace Redeagle Sacto receiving one half, and George Redeagle, the other. There is no dispute about the heirs nor the division of the property.

[Waont] you please let me hear from you by return mail, advising what the trouble is? A few days ago I wrote the

secretary of the Interior a personal letter, asking him to see where the matter was asleep.

Yours truly,

AE''

PAUL A. EWERT.

And these plaintiffs further allege that they are informed and believe, and from their information and belief state that there is a great many other records in the form of letters and communications between the Department of the Interior and the Department of Justice, and between the Defendant in this case and the Department of the Interior and the Department of Justice, which contradict the allegations of the defendant's petition and support the allegations of the plaintiffs' amended petition, and which the plaintiffs can obtain to be introduced in evidence in this case if they are permitted to file the amended petition as herein prayed.

Plaintiffs state that at all times from the time their suit was filed until after this case had been submitted for decision by this Court they believed that their deed had been approved without fraud on the part of the defendant, and had no knowledge of the matters and things herein set forth; that they are permitted to file their amended petition they will take depositions and present in proper and legal form proof of all of the matters set forth in their amended petition.

A. SCOTT THOMPSON
HIRAM W. CURREY

Attorneys for Plaintiffs.

Endorsed: Filed in the District Court on June 4, 1917.

Defendant's Answer to the Motion of the Plaintiffs to
Set Aside Submission of Cause and for Leave to
Amend.

The defendant, Paul A. Ewert, for answer to the application of the plaintiffs herein to set aside the submission of the cause and for leave to amend, shows to the Court that the matters and things set forth in the application are under the rulings of this Court as made at the trial, entirely immaterial and they do not tend in any way to support the cause of action of the plaintiff.

The defendant further shows to the Court that the correspondence set out and relied upon shows conclusively that the defendant was not in the employ of the Interior Department of the United States, and was not in the Indian service,

and that there was no legal reason at the time of making the purchase of the lands involved in the suit, why the said defendant should not or could not validly purchase the lands in question. The correspondence submitted shows that the Secretary of the Interior and the Attorney General of the United States both so held, and the said correspondence further shows that the defendant was in no manner or fashion
68 guilty of any fraud of any kind with respect to the purchasing of the said lands.

But the defendant further shows to the Court that if this Court is of the opinion that any of the matters set forth in the plaintiffs' application are material and are matters which this court would admit in evidence upon a retrial of the case, that then before this application is finally heard and disposed of that the Court should direct that all the correspondence relating to this transaction including the report of Special Agent Leinen, who was directed in January, 1910, to reinvestigate all of these matters, shall be produced in Court and made a part of plaintiffs' application. Defendant shows to the Court that all of the matters complained of by the plaintiffs in this case were twice fully investigated by the Department of Justice and the Department of the Interior and twice passed upon by both of said departments, each time in favor of the defendant's good faith, the validity of his purchase and entire absence of fraud.

First: In support of these contentions, defendant need not direct the attention of the Court to the fact that the case has already been tried, and the Court has ruled upon the admissibility of a certain class of evidence; that it has been argued orally and again submitted, and those oral arguments supported by briefs, and is now only waiting for the final decision of this court.

Second: The plaintiffs' application does not exhibit to the Court any reason or reasons for their negligence or refusal to produce at the trial the evidence which they now submit; that said evidence was then as now and at all times previous to the trial, within their power to procure and use and their
69 failure not to produce it at that time, makes them guilty of such laches as will now estop them from offering the same as a reason or excuse for withdrawing the submission of the case with a view to amending their pleadings and asking for another trial.

Third: This Court is a busy court, and defendant need not ask the indulgence of the Court for now pointing out the correspondence set out in the application which shows conclu-

vely that the defendant was not an employee of the Department of the Interior, nor engaged in Indian Affairs within the meaning of Section 2078 of the Revised Statutes of the United States, and within his legal rights in purchasing said lands.

On page 5, of plaintiffs' application appears a letter purporting to have been written by the Commissioner of Indian Affairs to the Secretary of the Interior, from which we quote as follows:

"The case has been carefully investigated and it appears from the papers in the case That Mr. Ewert Acted Within the Law and there is no suspicion of fraud in the transaction."

And again on Page 2 of plaintiffs' application in the case of George Redeagle vs. Paul A. Ewert, submitted with this case, there appears the following, over the signature of Frank Pearce, First Assistant Secretary in a letter directed to the General Attorney, under date of June 26th, 1909:

"Mr. Ewert is an employee of your department detailed by the Department of Justice to examine the legality of titles to Quapaw lands."

And again in a final letter from Walter S. Fisher, Secretary of the Interior to Congressman Davenport, written under date of June 8th, 1911, appears the following:

0 (Paragraph 5, page 7 plaintiffs' application)

"In this connection it may be observed that Mr. Ewert is not an employee of the Indian office And In Strictness Was Within His Legal Rights In Bidding On The Land In Question."

and again on page 4 of plaintiffs' application in the Redeagle case, appears the following over the signature of Walter L. Fisher, Secretary of the Interior:

"Considerable correspondence has passed between this Department and the Department of Justice regarding the matter which was investigated specially by the Special Agent of the Department of Justice, and also by an Inspector of this Department without eliciting anything which would warrant the institution of a suit to set aside the deed."

It will be noticed that the above letter was written under date of June 8th, 1911, to Congressman Davenport and is subsequent to the date of the report on this matter by Special Agent Leinen. And again on Page 9 of Plaintiffs' applica-

tion in the George Redeagle case appears the following in a letter written by Assistant Secretary Pearce to S. M. Brosius:

"Mr. Ewert being an employee of the Department of Justice, a copy of your letter has been sent the Attorney General for his information."

and again on page 13 of plaintiffs' application in the Redeagle case, appears the following in a letter written by Attorney General Wickersham to R. A. Ballinger, Secretary of the Interior, under date of December 21st, 1909:

"At that time (referring to the date of the interview between Ewert and Wickersham before the approval of the Bluejacket deed) I told Mr. Ewert that I saw no legal reason why he should not purchase the land in question."

71 Plaintiffs lay stress upon a certain letter found on pages 5 and 6 of this application, purporting to be a letter written by R. G. Valentine, Commissioner of Indian Affairs, and later approved by Frank Pearce, as Assistant Secretary, from this letter arguing that the Bluejacket deed was disapproved.

An examination of the letter and further correspondence shows this is not the case. The deed was never disapproved as shown by a certified copy attached to the petition and the defendants' answer herein. The letter referred to on pages 5 and 6 was not a disapproval of the deed but a recommendation for disapproval by subordinate officers of the Department. Upon its face it appears never to have been signed by R. G. Valentine, but by a Clerk in his office, who initials himself "E. P. H." Defendant doubts the authenticity of the two lines of disapproval appearing over the signature of Frank Pearce, and directs the attention of the Court to the fact that this letter does not purport to have been signed by him, but is initialed "O. G. P." In proof of this fact it is only necessary to cite the letter which follows this letter, found on page 6, written by Secretary Pearce, under date of June 26th, wherein he states

"The matter (the approval of the deed) is referred for your consideration, and the deed will be held in the Indian Office pending your advice."

It must be apparent to the Court that counsel in this case have had access to the entire files concerning this matter in the Indian Office, and in the office of the Secretary of the Interior. They have inserted such letters as they thought at least would be beneficial to their interests, and it is submit-

ed that all the correspondence in this case should be before this court from the very beginning to the final report absolutely absolving the defendant and placing the stamp of approval of the Department upon this transaction as far as its legality and fairness and absence from fraud is concerned.

Counsel fails to set up in connection with the last mentioned matter, the letter which the defendant believes is in their possession, dated July 26th, 1909, written to the Commissioner of Indian Affairs, and signed by Frank Pearce, as Assistant Secretary, reading as follows:

"The only objection to the approval of this deed is the fact that the grantee at the time of the purchase was and is still an employee of the Department of Justice, engaged in investigating illegal sales and leasing of lands within the Quapaw Agency and prosecuting litigation for the cancellation of such illegal instruments.

When the deed was received the matter was called to the attention of the Attorney General who, in his letter of July 2nd, states that he has discussed the matter with Mr. Ewert, and has received an explanation 'which it seems to be frees him from any offense in the transaction.'

This land was appraised at \$4900.00., and offered at public sale a number of times the highest bid being \$4000.00. At the offering when Ewert purchased, his was the only bid received. There is nothing in the papers to indicate that Ewert gained any advantage in this matter by reason of his employment by the Department of Justice or that there was any irregularity whatever in the transaction."

(From verified copy of letter in hands of the defendant.)

Plaintiff lays much stress in their application upon the purported fact that the Department of the Interior did not have knowledge of the fact when they were considering the approval of the Bluejacket deed and when they were later considering the entire transaction, that Ewert was in truth and in fact a real purchaser of the one hundred acre tract known as the Redeagle land and mentioned in the case of

Redeagle vs. Ewert. In the first instance they overlooked the fact that the sole question at any time in the mind of either the Attorney General or the Secretary of the Interior was a matter of propriety or perhaps policy of the office in the approval of the deed both officers over their signature in writing and in conversation had as shown by the

testimony ruled that there was no legal reason why Ewert could not purchase land at these public sales open to all bidders, and this view has already been taken by the Court in its prior rulings. The Court held it was immaterial whether the Indian Agent who appraised the lands in question months before Ewert was appointed to the service was incompetent or otherwise. It ruled that the sole question in the case was whether or not the defendant under Section 2078 was prohibited from buying these lands at public sale when the Constitution of the United States had provided a manner whereby the Indian might dispose of both his inherited and allotted lands, thus taking the matter entirely out of the hands of the Indian himself so far as the sale was concerned and placing it in the hands of the Secretary of the Interior where abundant safe guards were thrown about the sale so that the Indian might receive the full value of the land.

However, counsel failed to direct the attention of the Court to the fact that the correspondence in the file which, as this Court knows, is all carried under one number in one file, further shows that Special Agent Benham of the Department of Justice referred to in the correspondence made a lengthy report upon this entire transaction, which report shows that the Department did have knowledge of the purchase of the lands in question because the report was placed not only in the hands of the Attorney General, but in the hands of the
74 Secretary of the Interior, and with that report before them and with all the advice before them, they still approved the Bluejacket deed and refused to ask that the land be re-deeded and refused to have a suit instituted asking for the cancellation of the deed.

Defendant will not, in his answer, go into the matter of the affidavits of grantee because those affidavits prove nothing and are entirely immaterial, both as to the Ewert affidavit and the Franklin Smith affidavit.

Counsel further directs the attention of the Court to the fact that in the Bluejacket case numerous letters which should be attached to the petition are not attached thereto, but are found in the Redeagle case, and that the correspondence found in the Redeagle case should also be found in the Bluejacket case but are not therein set forth. In each instance the defendant refers to the correspondence contained in both applications because they both relate to the same subject matter.

As heretofore stated, it must be apparent to the Court that counsel have had access to the whole government file but have

failed to give the Court the benefit of all of the correspondence found therein. The correspondence which they set forth refers to two reports, one the Benham report and the other, the Lenien report, the latter of which throws full light upon the report of Mr. Benham and shows that Inspector Benham who was a new man in the service, was misled by the persons whom the government at that time was prosecuting, to the extent that he was shown even the wrong tract of land and [lead] to believe that the lands in question were located near and adjacent to valuable asphalt beds and that in company with the informants who were being prosecuted by the government, pieces of mineral were carried along with them and dropped at points on the land, particularly lead, whereas not a shine of lead has ever been found upon the Bluejacket land.

As stated in the beginning, if the Court believes that any of these matters are material, then before the application is granted, all of the correspondence and all of the reports should be before the Court for its consideration. Suffice it to say that after these various investigations, made at the request and urgent solicitation of men who were being then prosecuted in suits instituted by the government, and after reports had been made by Special investigating officers absolutely putting at rest the charges made, to the extent that both the Attorney General of the United States and the Secretary of the Interior should hold as they did hold, then there is nothing further for this Court in equity to pass upon.

Respectfully submitted,

W. H. KORNEGAY,
PAUL A. EWERT,
Attorneys for Defendant.

Endorsed: Filed in the District Court on June 4, 1917.

(Notice of Application for leave to file Amended Answer to Plaintiffs' Motion to set aside Submission of Case, etc.)

To the Plaintiffs above named, and to A. Scott Thompson and H. W. Curry, their Attorneys of Record:

You Are Hereby Notified, that the defendant in the above named cause, Paul A. Ewert, will in personem, or by counsel, on July 23, 1917, at ten o'clock A. M. or as soon thereafter as the same may be heard, at the city of Muskogee, State of Oklahoma, make application to the above named Court for

leave to file his Amended Answer to plaintiff's application herein to set aside submission of cause, and for leave to amend. A copy of which said Amended Answer is hereunto attached and made a part hereof and hereby served upon you.

Dated this 13th day of July, 1917.

PAUL A. EWERT, Defendant.

I hereby acknowledge receipt of the above Notice of Application to file an amended answer, and further acknowledge service upon me of a copy of said amended answer, by service of a copy of each.

Dated this day of July, 1917.

H. W. CURRY,
A. S. THOMPSON,
Attorneys for Plaintiffs.

79 Amended Answer of the Defendant in Opposition to the Application of the Plaintiffs to Set Aside the Submission of the Cause and for Leave to File an Amended Petition.

Plaintiffs have filed their application to have set aside the submission of the cause for leave to amend. It should be denied for the following reasons, to-wit:

First: The Plaintiffs Application Does Not Exhibit to the Court Any Reason or Reasons for their Neglect or Refusal to Produce at the Trial the Evidence which they now Submit. All the Evidence which they now Offer to Submit under an Amended Petition was Evidence which was Available to them at All Times, both in the Preparation of the Petition and in the Trial of the Suit.

The Case has been Tried, the Court has Ruled upon the Admissibility of the Class of Evidence which they Now Seek to Introduce Under an Amended Petition. The Case has been Argued Orally, the Oral Arguments have been Supported by Briefs. It would be Error to Re-open the Case and Permit the Plaintiffs to Amend their Petition after the Case had been Submitted.

80 Second: All of the Matters and Things which they Now Offer to Prove by Certain Documentary Evidence, are Matters and Things which the Plaintiffs in this Suit Cannot Rely Upon in Support of Their Cause, Because the Alleged Fraud Was Not Perpetrated upon them, the Mat-

ters and Things Alone Pertain to a Pretended Fraud Alleged to have been Perpetrated upon the Secretary of the Interior of the United States. They are Matters of which the Plaintiffs Cannot Avail Themselves.

Third: Under the Rulings of the Court already Made, the Documentary Evidence Set Forth in Plaintiffs Application Would Not be Admissible in Evidence.

Fourth: The Documentary Evidence which the Plaintiffs Offer to Produce, if Permitted to Amend, Shows upon its Face Affirmatively in Opposition to their Contention, that Ewert Was Not an Employee of the Department of the Interior, Nor Was He Engaged in Indian Affairs, within the meaning of Section 2078 of the Revised Statutes of the United States, and that Under the Rulings of Both the Attorney General of the United States and of the Secretaries of the Interior, Ballinger and Fisher, that the Defendant Was Within His Legal Rights in Purchasing the said Lands. It is so Expressly Stated in the Correspondence Submitted.

Fifth: It Further Appears from the Face of the Application that the Attorneys for the Plaintiffs Have Been Guilty Not Only of Gross Fraud upon the Court in Presenting after a Misleading Fashion Certain Correspondence, but it further Appears that they have Omitted Vital Correspondence which was in their Possession; and it further Appears that they have Presented for the Consideration of this Court Forged or Untrue Copies of the Correspondence Purporting to be in their Possession Under the Certificate of the Department of the Interior of the United States, all as shown by Documentary Evidence herewith Submitted.

81 Sixth: None of the Matters Submitted in the Application Tend to Bring the Subject Matter of the Action within the Statute of Limitations of the State of Oklahoma.

Seventh: None of the Matters Alleged in the Application take the Plaintiffs from without the Rule that they are Estopped in Equity from Asking for a Rescission.

Eighth: None of the Matters Set Forth in the Application Tend to take the Case from within the Provisions of the Exemption named in Section 2078 of the Revised Statutes of the United States, that "No Person Employed in the Indian Department shall have any Interest in any Trade with the Indians, Except for and on Account of the United States."

First.

The Plaintiffs Application Does Not Exhibit to the Court Any Reason or Reasons for their Neglect or Refusal to Pro-

duce at the Trial the Evidence which they Now Submit. All the evidence which they now Offer to Submit Under an Amended Petition was Evidence which was Available to them at All Times, both in the Preparation of the Petition and in the Trial of the Suit.

The Case has been Tried, the Court has Ruled upon the Admissibility of the Class of Evidence which they now Seek to Introduce under and Amended Petition. The case has been Argued Orally, the Oral Arguments have been Supported by Briefs. It would be Error to Re-open the case and permit the Plaintiffs to amend their Petition after the case had been submitted.

Plaintiffs ask the Court to set aside the submission of the cause and grant them leave to file an amended petition, upon the ground of certain correspondence which now is and has been in the office of the Secretary of the Interior and the Attorney General of the United States, presumably since the dates upon which they were written. They are official files. They offer no excuse to the Court for their lack of diligence, or their neglect and failure upon their part to produce and have the said letters at the trial of the case. Their opportunity for procuring the letters was as favorable at the time they drew their petition as it now is, and all the evidence which they now seek to submit is evidence which they could have procured by the exercise of reasonable diligence at the time the case was tried. They should have known what they were doing at the time they prepared their petition, and they had an abundance of time, months of time after they filed their petition and after the defendant's answer was filed, within which to procure all the evidence which they now ask the Court to permit them to introduce. The evidence is not newly discovered evidence, because it has always been available.

The plaintiffs have been guilty of such laches as warrants the Court in the exercise of its discretion and good judgment in denying their application to practically re-open the case and permit them to file an amended petition.

The case has been tried. At the time of its trial, the Court ruled upon the admissibility of certain evidence which they now again ask the Court to introduce after getting leave to file an amended petition. This Court ruled upon the admissibility of the character of the evidence which they now seek to introduce. The Court held that the sole question at issue in the case was whether or not Ewert was employed in Indian affairs, and if he was employed in Indian affairs, was the char-

acter of the transaction such as is prohibited by Section 2078 of the Revised Statutes of the United States.

The Court has ruled that it was immaterial whether or not Ewert purchased the Redeagle lands in the name of Franklin Smith, or in his own name. In making that ruling, it was presumed that the Secretary had no knowledge of the purchase of the land by Ewert; that Ewert had a right to purchase the land,—if he had any legal right at all,—in the name of whomsoever he desired. Of what avail would it be to the plaintiffs, if the case were re-opened, if the evidence which they claim to have discovered, is inadmissible under the rulings of the Court?

83 In any event, it is the opinion of counsel that the discretion of the Court is not so broad as to permit this case, which has already been tried out upon the pleadings and which has been already argued and upon which briefs have been submitted and upon which nothing remains to be done except to file the opinion of the Court, to be now re-opened. It is as if the case had been tried and submitted to the jury and the jury was out and was preparing its verdict and had not yet written it.

Upon this ground alone, the application should be denied.

Second.

All the Matters and Things which they Now Offer to Prove by Certain Documentary Evidence, are Matters and Things which the Plaintiffs in this Suit Cannot Rely Upon in Support of Their Cause, Because the Alleged Fraud Was Not Perpetrated upon them, the Matters and Things Alone Pertain to a Pretended Fraud Alleged to have been Perpetrated upon the Secretary of the Interior of the United States. They are Matters of which the Plaintiffs Cannot Avail Themselves.

Under the above point counsel desires to direct the attention of the Court to the fact that all of the correspondence which they offer as the ground for asking to have the submission set aside and a new trial granted upon an amended petition, are matters that pertain purely to what they claim to have been a lack of information upon the part of the Secretary of the Interior concerning Ewert's prior purchase of the Redeagle land through Franklin Smith, at the time the Blue-jacket land was purchased.

Not mentioning at this point the fraud which the attorneys for the plaintiffs are practicing upon the Court in withholding from the Court certain of the correspondence which passed

between the Secretary of the Interior and the Attorney General, counsel shows to the Court that upon the face of their application which must govern and control, the pretended fraud alleged to have been perpetrated and the pretended facts which are alleged to have been concealed are matters, which, if they gave anyone a right of action to set aside the deed, would give the Secretary of the Interior such a
84 right, but by no possible construction could they give a right to the plaintiffs to have the deed [ast] aside.

No fraud was practiced upon them. The matters which they allege in the application, are matters of concern only to the Secretary of the Interior, and it is submitted that from the correspondence which they themselves attach to their application and the correspondence which they have submitted and that which is herewith submitted, it affirmatively appears that the Attorney General of the United States had full knowledge of the fact that both purchases were made by the defendant, and that he had knowledge that the purchase of the Redeagle land in the name of Franklin Smith was made by Ewert, at the time and prior to the approval of the Bluejacket deed. The testimony shows it and the correspondence herewith submitted shows it.

It further appears from the correspondence attached to the plaintiffs application and that herewith submitted, that the Secretary of the Interior, Ballinger, if he was not informed of the prior purchase of the Redeagle land by Ewert, at the time he approved the Bluejacket deed, learned of it shortly thereafter and had full knowledge of the purchase by Ewert of both tracts of land, and with full knowledge, as a matter of discretion vested in him as the Secretary of the Interior of the United States, refused to ask him (Ewert) to reconvey the lands, and refused to bring an action to have the deed set aside.

It further appears that the successor of Mr. Ballinger, Secretary of the Interior, Walter Fisher, had full knowledge of both of these transactions, that with this full knowledge, he acquiesced in them and refused to institute suit to have one or both of the deeds set aside, and refused to ask Ewert to re-deed the lands.

It further appears from the correspondence which the plaintiffs themselves submit and from further correspondence herewith submitted, that the Attorney General of the United States and Secretary of the Interior Ballinger, and later
85 Secretary of the Interior, Fisher, all agreed, and so stated, that "Ewert Was Within His Legal Rights In

Purchasing The Said Lands." This, after all of the facts which plaintiffs claim they did not know in the first instance, had been directed to their attention by the investigation of Special Agent Benham, in November, 1909, by the answer to that report made by Ewert in December, 1909, and later by the investigation of Special Agent Lienen in March, 1910.

The correspondence further discloses that at the conclusion of all of these investigations the Department was of the opinion that no fraud had been practiced upon it; that the lands were sold at their approximate value; that there was not, and could not have been any collusion between the Indian Agent, Deaver, and the defendant, Ewert, because the lands were appraised and offered for sale numerous times, many months before Ewert received his appointment.

None of the matters and things alleged in the application deal or pretend to deal with any pretended fraud upon the plaintiffs in this case. It appears that the lands were sold under the direction of the Secretary of the Interior of the United States; it appears that the appraisement was made many months before the appointment of the defendant Ewert; it appears that the appraised value was acceptable to the plaintiffs who were selling the land, and that they accepted the consideration, and for the consideration signed the deed, and that they are estopped, and cannot avail themselves of any of the things and matters alleged in the application. They are all immaterial and inadmissible as evidence, and for this reason, too, the application should be denied.

86 Third.

Under the Rulings of the Court Already Made, the Documentary Evidence Set Forth in Plaintiffs Application Would Not Be Admissible in Evidence.

The argument under this point has partially been made in the preceding subdivision. The Court has squarely ruled that as far as the sale of the lands in question is concerned, it is immaterial whether Ewert purchased the lands in his own name or in the name of someone else, and rule that if Ewert had a right to purchase the lands as a matter of law, that he could purchase them through himself or as Trustee. Such conduct would not be a fraud upon the part of the plaintiffs who were offering the lands for sale.

The lands were in due form of law appraised under the rules and regulations of the Secretary of the Interior; guardians were appointed for the minors; due application was made to the Court; an order of Court was made directing that

the sale should be made; the same then proceeded, and was in all things regular and proper, being conducted in accordance with the laws of the United States and the rules and regulations promulgated thereunder by the Secretary of the Interior; the plaintiffs received the full amount of their consideration; they had a right to refuse to sign the deed if they did not think it was ample, the rules and regulations provide that. They did not do it. They accepted the consideration, signed the deed, delivered it to the Secretary of the Interior, who approved it, and the money was paid over to them. No fraud was practiced upon them. The sale was regular in all respects.

If the Court should permit the amendment to be made, the evidence which they claim they will submit, would be clearly inadmissible, under the rulings of the Court.

None of the Acts or things complained of are matters of which the plaintiffs could avail themselves in a suit in equity to set aside the deed, for no fraud was practiced upon them.

87 If there ever was a right of action, that right vested solely in the Secretary of the interior of the United States. Two Secretaries of the Interior and one Attorney General declined to exercise that right, upon the ground that no fraud had been perpetrated, and this after they had acquired a knowledge of all of the facts relative to both transactions after two investigations made by specially appointed investigators because of complaints made to them by certain grafters from the Government was at that time prosecuting, the suits being brought by the defendant. The correspondence submitted shows that fact.

For this reason too, the application should be denied.

Fourth.

The Documentary Evidence which the Plaintiffs Offer to Produce, if Permitted to Amend, Shows upon its Face Affirmatively in Opposition to their Contention, that Ewert was Not an Employee of the Department of the Interior, nor was he Engaged in Indian Affairs, within the Meaning of Section 2078 of the Revised Statutes of the United States, and that under the Rulings of both the Attorney General of the United States and of Secretaries of the Interior, Ballinger and Fisher, that the Defendant was Within His Legal Rights in Purchasing the Said Lands. It is so Expressly Stated in the Correspondence Submitted.

On page 5 of the plaintiffs application in the Bluejacket case, plaintiffs set forth a certified copy of an official letter

purporting to have been signed by the Commissioner of Indian Affairs. The letter is of date of July 19, 1909. That letter contains the following statement:

"The case (the sale of the Bluejacket land) has been carefully investigated and it appears from the papers in the case that Mr. Ewert Acted Within The Law and there is no suspicion of fraud in the transaction. The appraised value of the land described in the deed is \$4900. The tract has been advertised and readvertised a number of times, but in each case the bids did not equal appraisement."

On page 2 of the plaintiffs application in the Redeagle case, there appears a copy of a letter written under date of June 26, 1909, purporting to have been signed by Frank Pierce, First Assistant Secretary, which states:

88 "Mr. Ewert is an Employee of your Department, Detailed by the Department of Justice to Examine the Legality of Titles of Quapaw Lands."

Again, on page 9 of plaintiffs application in the Red-eagle case appears a letter purporting to have been written under date of November 19, 1909, by Frank Pierce, Assistant Secretary of the Interior addressed to S. M. Brosius, Agent of the Indian Rights Association, in which appears the following statement:

"Mr. Ewert being an employe of the Department of Justice, a copy of your letter has been sent to the Attorney-General for his information."

Again, on page 13, of the plaintiffs application in the Red-eagle case, appears a copy of a letter dated December 21, 1909, written by George W. Wickersham, Attorney General, to R. A. Ballinger, Secretary of the Interior, in which appears the following:

"It is true that he (Ewart) bought the land for \$5,000, while Mr. Benham reports its actual value at the time of its purchase at \$15,000, but it also appears that the valuation was made two years before Mr. Ewart went to Oklahoma, and that the property was twice previously advertised for sale and each time the bidder offered less than the appraised value. These are the only additional facts learned since the deed was presented for approval last June. At That Time I Told Mr. Ewart That I Saw No Legal Reason Why He Should Not Purchase The Land In Question. * * * * *

I have no doubt, however, that if I should request it, he

would reconvey the property to the Government upon receiving back his purchase money, and if you think it desirable to make that request of him, I will do so; although I should prefer not to, in view of the action taken in June and above referred to."

This letter was dated and written subsequent to the report of Special Agent Benham, dated November 21, 1909, the original of which was on file in the office of the Secretary of the Interior of the United States, and plaintiffs counsel in Washington had an opportunity to see it, and knew of its existence. In that report, Benham deals not only with the purchase of the Bluepacket land, but with the purchase of the Redeagle land by Ewart, so that the Department at that time had full knowledge of the purchase by Ewart of the Redeagle land.

Again, on page 3 and 4 of the plaintiffs application in the Redeagle case, appears a certain official letter dated June 8, 1911, addressed by Walter L. Fisher, Secretary of the Interior, to Congressman Davenport, wherein the Honorable Secretary of the Interior states:

"Considerable correspondence passed between the Department and the Department of Justice regarding the matter (the purchase of the Bluejacket and Redeagle lands by Ewart, mentioned in the Davenport letter to the Secretary), which was investigated specially by a Special Agent of the Department of Justice and also by an Inspector of this Department, without eliciting anything which would warrant the institution of a suit to set aside the deed.

"In this connection it may be observed that Mr. Ewart is not an employee of the Indian Office, And In Strictness Was Within His Legal Rights In Bidding On The Land In Question."

This letter is dated June 8, 1911 and was subsequent to the report of Special Agent Benham dated November 20, 1909, and Ewart's reply thereto dated December 22, 1909, and the report of Special Agent Leinen dated March 26, 1910, in all of which reports it is especially directed to the attention of the Attorney General and the Secretary of the Interior the matter of the purchase of the Redeagle land by Paul A. Ewart in the name of Franklin Smith.

It may be further said in explanation as relevant in the Bluejacket matter, that counsel for the plaintiffs failed to set up in their application a certain certified copy of a letter

which the defendant believes to be in their possession, dated June 26, 1909, written to the Commissioner of Indian Affairs, and signed by Frank Pierce, as Assistant Secretary of the Interior, reading as follows:

“Land-Sales
40233-1909
E S S

Inherited Indian land
deed to Paul A. Ewart.

6/26/09.

The Attorney General.

Sir:

On May 1, 1909, the Superintendent of the Quapaw Agency forwarded an inherited Indian Land Deed executed by the heirs of Charles Bluejacket, conveying to Paul A. Ewert, for \$5000, 200 acres of land in Ottawa County, Oklahoma.

Mr. Ewart is an employee of your Department, detailed by the Department of Justice to examine the legality of titles of Quapaw lands.

90 The matter is referred for your consideration, and the deed will be held in the Indian Office pending your advice.

Very respectfully,

(sgd) FRANK PIERCE
First Assistant Secretary.

E. H.-19
2462” .

A certified copy of the above letter is in the hands of the defendant and will be submitted to the Court.

Plaintiffs further, as defendant believes, with a deliberate intent of misleading this Court, failed to set up in their application the report of Special Agent Benham of the Department of Justice, which was made by direction of the Department of Justice, under date of November 21, 1909, wherein Benham reports upon both the purchase of the Bluejacket land, and on page 20 thereof, deals specifically with the purchase of the Redeagle land by Ewert. A certified copy of that report is in the hands of the defendant, and if the Court directs, will be filed herewith.

Neither do the plaintiffs in their said applications, in any wise refer to the reply of Ewert made to that report under date of December 22, 1909, wherein he deals specifically with

the purchase of both of these tracts of land, and wherein on pages 12 and 13 appears Ewert's statement relative to these purchases. A certified copy of this report is in the hands of the defendant and will be submitted to the Court if desired.

Defendant further shows to the Court that the Department after the Benham report was submitted, was convinced that Benham had been misled in many respects and had in fact, been shown the wrong tract of land by the persons from whom he got his information, to-wit: The defendants in a number of suits which the Government through Paul A. Ewert, had instituted against said defendants. Counsel for the plaintiffs had access to the Leinen report, which was submitted to the Department under date of March 26, 1910; they had a special attorney in Washington examining all of the files and records, and defendant believes, and so states that they have a certified copy of that report in their possession.

The Leinen report in this matter, and in other matters
91 covers seventy-three pages of typewritten matter.

The result of the investigation as summarized by him, appears on pages 23 and 25, and taken from the certified copy thereof now in the possession of the defendant, reads as follows:

(pp. 24-25)

"1st. I am fully satisfied that Superintendent Ira C. Deaver is honest and upright and has been conducting the affairs of the Quapaw Agency in an honest, fair and impartial manner without collusion with Assistant Attorney General Paul A. Ewert, Horace B. Durant, former Superintendent of the Quapaw Agency, or any other person or corporation;

2nd. That the lands purchased by Mr. Paul A. Ewert, Special Assistant Attorney General, have no particular value as mining lands and that he paid substantially the market value of said lands at the time he purchased same through Superintendent Ira C. Deaver, at open market sale, under competitive sealed bids;

3rd. That there was no collusion in the purchase of said lands through said Agency, the same having been appraised prior to Mr. Ewert's coming to Oklahoma, and advertised and re-advertised for a period of some nine months prior to sale;

4th. The complaints made by Mr. E. T. McCarthy, of Baxter Springs, Kansas, to Senator Joseph L. Bristow and to the Reverend William H. Ketchum, Director of the Bureau of Catholic Indian Missions, Washington, D. C., and by them

referred to this Department, are not justified by the facts and it is doubtful if such charges are made in good faith, with good intentions and in the interest of the Indians as set forth."

Relative to the purchase of the Redeagle land, which counsel for the plaintiffs expressly state in their application was not known to the Department for several years after the purchase thereof, Mr. Leinen in his report says: (pp. 60-61-62)

"The other tract of land purchased by Mr. Ewert in the name of Franklin Smith is the east half of the southeast quarter and the east half of the southwest quarter of the southeast quarter of section twenty-one, township twenty-nine range twenty-three east of the Indian Meridian, containing one hundred acres. This land is located one mile north and one mile west of the town of Quapaw instead of about one mile west, as stated by Mr. Benham in his report. He says, "It is a beautiful tract of perfectly level farming land and while it is in the mineral belt, it has never been developed. One mile to the west there is a large asphalt bed, considered very valuable." I am inclined to believe that Mr. Benham did not see the right tract of land, the fact being that the land is badly cut with ravines and gulches. About one-third of said tract is unfit for agricultural purposes by reason of deep ravines and draws which decreases the value of the land very much. The soil is very light and it is a poor farming tract, only about two-thirds of same can be farmed. There is a three year lease on it which prevents the present owner, Mr. Ewert, from using the land although he has to pay the taxes on same. This land is not in the mineral belt. There is no asphalt bed in the vicinity, and no known asphalt deposit in Ottawa County, Oklahoma. The land was
92 purchased for thirteen dollars per acre. It is worth now possibly from fifteen to seventeen dollars an acre and I very much doubt if it could now be sold for the latter named figure, which is certainly all it is worth at the present time for farming purposes, and that is its only value.

"These are the only two tracts of land purchased by Mr. Ewert in this country. Of course, it was indiscreet in him and a matter of poor judgment that he purchased these Indian lands, but I believe he did so with honest intentions and without any idea of doing wrong, they being advertised at public sale and sold to the highest bidder above the appraisalment, and there certainly being no collusion between him and Mr. Deaver, the Superintendent of the Quapaw Agency. He simply gave these people whom he is suing for

defrauding the Indians an opportunity to criticize and make much of his indiscretion."

The above is an extract from the certified copy of the report in the hands of the defendant, and will be submitted to the Court if requested.

Counsel for the plaintiffs further fail to set up in their pleadings a certified copy of the letter now in the possession of the defendant, of which said counsel had knowledge, because found in the files, to-wit: The letter of July 2, 1909, addressed by Wade H. Ellis acting as Attorney General to Honorable Frank Pierce, Acting Secretary of the Interior, in which the acting Attorney General says:

"On receiving your letter of the 26th ult. I communicated at once with Mr. Paul A. Ewert, who was here and have received from him an explanation with respect to the purchase of the land described in the deed referred to in your letter, which, it seems to me frees him from any offense in the transaction."

In explanation of the above, defendant desires to state that he knows of his own knowledge that counsel for these plaintiffs employed an especial attorney at Washington, D. C. to examine all of these files, and that the said attorney did examine all of said files; that all of the letters above mentioned are on file in said files and a part thereof, and defendant charges counsel for the plaintiffs with bad faith towards the Court, and with personal dereliction if not dishonesty, in the preparation of their said application.

And with the above explanation as to the knowledge within the hands of the Secretary of the Interior and the Attorney General, counsel will make no answer to the several
93 telegrams and letters set up in the applications, for the reason that the supposed argument presented by them absolutely falls. The Bluejacket deed never was disapproved. Certain letters appear to have been written by subordinates in the Department, who signed the name of their superior officer, but properly initialled the communications. When the deed was finally presented to the Commissioner of Indian Affairs and the Secretary of the Interior, it was approved by both officials after the fullest investigation.

In the Bluejacket application, counsel set up certain letters written in May, 1913, by the defendant to the Department of the Interior, for the purpose of making it appear that the

Secretary of the Interior did not know of the purchase of the Redeagle land, and this in spite of the fact that the purchase of the said Redeagle land had been investigated by Benham and reported, and reinvestigated by Inspector Leinen and reported, and that counsel had in their possession, or could have obtained copies of said reports, because they are on file with the general file from which the other letters were procured.

If this be true, deliberate fraud was practiced upon the Court and the matter is dealt with under the subsequent subdivisions hereof.

Fifth.

It Further Appeals from the Face of the Application that the Attorneys for the Plaintiffs have been Guilty not only of Gross Fraud upon the Court in Presenting After a Misleading Fashion Certain Correspondence, but it Further Appears that they have Omitted Vital Correspondence which was in their Possession; and it Further Appears that they had Presented for the Consideration of this Court Forged or Untrue Copies of the Correspondence Purporting to be in their Possession under the Certificate of the Department of the Interior or the United States, all as shown by Documentary Evidence Herewith Submitted.

The defendant under the Fourth subdivision hereof, has already directed the attention of the Court to matters coming under this subdivision, and defendant charges and will show to the Court that the attorneys for the plaintiffs for months had an attorney employed in Washington, D. C.; that the said attorney had access to all of the files containing all of the correspondence and all of the reports hereinbefore referred to. In order to mislead the Court so that it might grant their application, they have presented to the Court certain letters which they thought would be beneficial and concealed from the Court other correspondence which is found in the same Government file in Washington, as are the letters which they have quoted from, all set forth in full in said files; and the attorney for defendant further directs the attention of the Court to the fact that the letters which they set forth in full referring to the Benham report and to the Leinen report, in which are found lengthy discussions of the purchase by Ewart of the Redeagle land, show that these reports were made prior to some of the letters appearing in their own application. Yet, notwithstanding this act, plaintiffs in their application in the Bluejacket matter,

set up certain letters from Paul A. Ewert to the Interior Department, the same being found on pages 10, 11, 12, 13 for the purpose of misleading the Court and making it appear that even as late as the date named the Department of the Interior and the Department of Justice did not know that Ewert was the purchaser of the Redeagle land. Counsel A. Scott Thompson in open Court stated that to be the fact, at McAlester, Oklahoma, on the last rule day of said Court. The defendant in response thereto, stated to the Court that this was an untruth and was known to be an untruth by counsel for the plaintiffs, and he further said that proof would be made to the effect that counsel in their application was presenting untrue copies, if not forged copies of purported correspondence emanating from the office of the Secretary of the Interior of the United States. The first charge has already been directed to the attention of this Court, the second charge will now be considered:

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Caught With the Goods.

In the opening paragraph in the application in the Bluejacket matter, at the bottom of page 1, counsel state:

"And the said deed (referring to the Bluejacket deed) was disapproved by the Indian Commissioner, and the then Secretary of the Interior."

In order to substantiate that charge, they set forth on page 5 of said application, a certain letter dated July 19, 1909. It appears that the letter is signed "R. G. Valentine, Commissioner," but underneath the signature appears the initials "E. P. H.", apparently one of the Clerk's. The letter then closes as follows:

"The within deed is disapproved and is returned.

FRANK PIERCE,
First Assistant Secretary."

OGP-15
3173

As a matter of fact, the letter in question is nothing more than a recommendation upon the part of some Clerk in the office of the [them] Commissioner of Indian Affairs recommending that the deed be disapproved. The letter is not signed by Valentine. Apparently it is [initialled] "E. P. H." It will also be noticed that at the left thereof appear the letters "O. G. P." indicating that one of the then law clerks, O. G. Pollock, had added at the bottom of the letter the words,

"The within deed is disapproved and is returned.

FRANK PIERCE,
First Assistant Secretary."

The deed in fact was not disapproved by Frank Pierce, First Assistant Secretary. When the communication came to him, he did not concur in the recommendation of the Clerk from the Commissioner's office, but with a big blue pencil crossed out the recommendation of disapproval and underneath that attached his initial "F. P." Mind you, this was the letter, not the deed. The letter states that all the papers were enclosed. That is all that happened. The deed was not disapproved by Frank Pierce and never was disapproved by him. Yet, in order to deceive the Court 96 into believing that Assistant Secretary Pierce disapproved the deed itself, they left off from the copy attached to their application the crossing out of the recommendation for disapproval by Frank Pierce, together with his initial "F. P."

It alone is all the more inexcusable and all the more a forgery because the attorneys for the plaintiffs have in their possession photographic copies of said letter which shows all of the above things. The defendant has in his possession and will submit to the Court upon this hearing, a certified copy of the said letter, showing the above charges to be true.

The defendant further shows to the Court that the notice of the application in this matter was served upon the defendant only a few days before the rule day at McAlester, and counsel did not have time to verify the suspicions then stated as to the falsity of the matters set forth in said application, but he immediately transmitted to the office of the Commissioner of Indian Affairs a copy of plaintiffs' application, whereupon the Commissioner wrote to A. Scott Thompson, plaintiffs' attorney, as follows:

"Department of the Interior
Office of Indian Affairs.
Washington.

Land
W R L.

Jun 14 1917

Mr. A. Scott Thompson,
Miami, Oklahoma.

Sir:

It has come to the attention of the Office that you, as attorney for the plaintiffs in the action entitled George Red Eagle, plaintiff, versus Paul A. Ewert, defendant, in the Dis-

trict Court of the United States for the Eastern District of Oklahoma, have filed a letter, certified by this Office, dated July 19, 1909, signed by R. G. Valentine, as Commissioner, and approved by Frank Pierce, as First Assistant Secretary, without qualification.

The certified copy of the letter above mentioned, if it was not a photographic copy, should have shown thereon the following notation:

This letter shows the signature of Frank Pierce, First Assistant Secretary, below the disapproval; but the signature is crossed out in blue pencil over the initials F. P., also in blue pencil.

You are requested to return at once the certified copy above referred to and on its receipt the Office will immediately have a photographic copy made and duly certified of the
97 letter of July 19, 1909 and forwarded to you as a substitute for the certified copy heretofore furnished.

It is requested that you give this matter your special and early attention.

Respectfully,

E. B. MERRITT,
Assistant Commissioner.

6-RFP-12."

In answer to the above letter, counsel write to the Commissioner of Indian Affairs as follows:

"June 22, 1917.

The Commissioner of Indian Affairs,

Sir:

I have your letter of June 14, relative to a certain letter which I had certified by your office written by R. G. Valentine as Commissioner, to the Secretary of the Interior, regarding your approval of a certain deed in which Mr. Paul A. Ewert is grantee, said letter being dated July 19, 1909. You ask me to return the letter that I have. I am not returning this letter for the reason that there seems to be no discrepancy in the original, as you describe it, and the copy which I have. There can be no mistake about the copy I have as it is a photographic copy. I have examined the copy in my possession and find it to be practically the same as you describe the original to be. It is signed by Frank Pierce, as 1st Asst. Secretary and there are marks over the signature, but of course the photographic copy does not show the color, and below the signature are the initials "F. P."

I see no good reason for returning this certified copy inasmuch as it conforms to what you describe the original to be, unless you can give me some further reason for doing so. I do not wish to be impertinent, but do not think, from my explanation, that you should request it.

On the other hand, I have not filed the letter as you seem to be informed, but did file a motion to re-open the case and in the motion set out certain letters, deeming it necessary to show from correspondence between Ewert, the Commissioner, and the Attorney-General that Ewert was in fact the purchaser of the Redeagle land.

As to some of these letters, we merely set out part of them to show the court that we have substantial reasons for re-opening the case. The copy set forth in the motion did not show the pencil marks. The motion has not been presented to the court, as you suggest. We are informing the court of the nature of the correspondence, and will show him the certified photo copy. If the case is re-opened, we expect to take depositions and get photo copies of the original papers in the Department. Unless I hear from you I will take this as a satisfactory explanation and that you do not require return of the certified copy, which conforms to the original as you describe it to me.

A. SCOTT THOMPSON."

98 The above appear from certified copies of said letters now in the possession of counsel for the defendant, and same will be produced in Court.

Further comment would seem to be unnecessary.

Counsel not only falsely states that the deed was disapproved by the Secretary of the Interior, whereas, in truth and in fact, it never was disapproved, but even misleads the Court into believing that Frank Pierce himself recommended the disapproval of the deed by the letter in question. As a matter of fact, he crossed out the recommendation of disapproval with a blue pencil when it came to him.

Sixth.

None of the Matters Submitted in the Application Tend to Bring the Subject Matter of the Action Within the Statute of Limitations of the State of Oklahoma.

None of the matters and things alleged in the application, if true, would take the case from without the statute of Limitations. The action is one for rescission upon ground of fraud, as shown by the petition, and comes under Sub-divi-

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sion 3, of Section 4657, of the Revised Laws of Oklahoma for 1910, and it is held by numerous decisions of the Supreme Court that such an action must be brought within two years after a fraud is discovered. More than eight years have now passed since the sale was made, and the action is barred.

Campbell vs. Dick, 157 Pac., 1062;
Webb vs. Logan, 150 Pac., 116;
New vs. Smith, 119 Pac., 380;
Dodson vs. Middleton, 135 Pac., 368;
Maddox vs. Smith, 148 Pac., 842.

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Seventh.

None of the Matters Alleged in the Application Take the Plaintiffs from Without the Rule that They Are Estopped in Equity from Asking for a Rescission.

None of the matters alleged in the application, if admitted, take the matter from without the rule of estoppel which defendant has involved as against the conduct of the plaintiffs. Eight years have passed. They received the full consideration; they have not returned or offered to return it, and for the first time, now make complaint. They are now estopped in equity from asking for a rescission.

Eighth.

None of the Matters Set Forth in the Application Tend to Take the Case From Within the Provisions of the Exemption Named in Section 2078 of the Revised Statutes of the United States, that "No Person Employed in the Indian Department Shall Have Any Interest in Any Trade with the Indians, Except For and On Account of the United States."

It is respectfully submitted that it plainly appears from the pleadings and the proof and from the application made in the above matter, that the purchase in question was made by the defendant through the Secretary of the Interior of the United States; that he received the purchase price and held it in trust for the allottees; the plaintiffs, disbursing it under the rules of the Department of the Interior. The sale was therefore one which comes within the proviso contained in Section 2078 of the Revised Statutes of the United States, to-wit:

"No person employed in the Indian Department shall have any interest in any trade with the Indians, except for and on account of the United States."

It is respectfully submitted that the application of the plaintiffs in the above matter is not made in good faith, but extremely bad faith, with the intention of misleading this Court and getting into the record before the Appellate Court certain letters for the purpose of prejudicing the Court against this defendant. Further comment on their conduct at this time is unnecessary.

Respectfully submitted,

PAUL A. EWERT,
Defendant.

101 Endorsed: Filed in the District Court on July 20, 1917.

102 (Order, July 23, 1917, Submitting Motion to Set Aside the Submission of the Case.)

Before Judge Campbell.

Now on this 23rd day of July, 1917, it is ordered that the motion of Complainants herein to set aside the order heretofore entered submitting this cause, be and the same is now taken under advisement.

(Order, March 4, 1918, Overruling Plaintiff's Motion to Re-open Case.)

Before Judge Campbell.

This cause was heretofore on the 15th of March, 1917, consolidated for trial with the case of George Redeagle, against Paul A. Ewart, this defendant, Equity Number 2293, and the evidence taken in said cause, Equity number 2293, considered as the evidence in this case and;

Now on this 4th day of March, 1918, and before the entry of final decree herein, comes on for consideration the motion of the plaintiff filed herein on June 4th, 1917, to set aside the order of submission of this case theretofore entered and to have this cause reopened and to permit plaintiff to amend the petition herein and offer further evidence in support thereof, which motion with exemplification by certified copies of the letters and correspondences set forth referred to and described in the motion was presented to the Court, orally argued by counsel for plaintiff and defendant

sion 3, of Section 4657, of the Revised Laws of Oklahoma for 1910, and it is held by numerous decisions of the Supreme Court that such an action must be brought within two years after a fraud is discovered. More than eight years have now passed since the sale was made, and the action is barred.

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None of the matters alleged in the application, if admitted, take the matter from without the rule of estoppel which defendant has involved as against the conduct of the plaintiffs. Eight years have passed. They received the full consideration; they have not returned or offered to return it, and for the first time, now make complaint. They are now estopped in equity from asking for a rescission.

Eighth.

None of the Matters Set Forth in the Application Tend to Take the Case From Within the Provisions of the Exemption Named in Section 2078 of the Revised Statutes of the United States, that "No Person Employed in the Indian Department Shall Have Any Interest in Any Trade with the Indians, Except For and On Account of the United States."

It is respectfully submitted that it plainly appears from the pleadings and the proof and from the application made in the above matter, that the purchase in question was made by the defendant through the Secretary of the Interior of the United States; that he received the purchase price and held it in trust for the allottees; the plaintiffs, disbursing it under the rules of the Department of the Interior. The sale was therefore one which comes within the proviso contained in Section 2078 of the Revised Statutes of the United States, to-wit:

"No person employed in the Indian Department shall have any interest in any trade with the Indians, except for and on account of the United States."

It is respectfully submitted that the application of the plaintiffs in the above matter is not made in good faith, but extremely bad faith, with the intention of misleading this Court and getting into the record before the Appellate Court certain letters for the purpose of prejudicing the Court against this defendant. Further comment on their conduct at this time is unnecessary.

Respectfully submitted,

PAUL A. EWERT,
Defendant.

101 Endorsed: Filed in the District Court on July 20, 1917.

102 (Order, July 23, 1917, Submitting Motion to Set Aside the Submission of the Case.)

Before Judge Campbell.

Now on this 23rd day of July, 1917, it is ordered that the motion of Complainants herein to set aside the order heretofore entered submitting this cause, be and the same is now taken under advisement.

(Order, March 4, 1918, Overruling Plaintiff's Motion to Re-open Case.)

Before Judge Campbell.

This cause was heretofore on the 15th of March, 1917, consolidated for trial with the case of George Redeagle, against Paul A. Ewart, this defendant, Equity Number 2293, and the evidence taken in said cause, Equity number 2293, considered as the evidence in this case and;

Now on this 4th day of March, 1918, and before the entry of final decree herein, comes on for consideration the motion of the plaintiff filed herein on June 4th, 1917, to set aside the order of submission of this case theretofore entered and to have this cause reopened and to permit plaintiff to amend the petition herein and offer further evidence in support thereof, which motion with exemplification by certified copies of the letters and correspondences set forth referred to and described in the motion was presented to the court, orally argued by counsel for plaintiff and defendant

and by the court taken under advisement, and the
103 court now being advised in the premises;

It is ordered that said motion to reopen this cause and permit plaintiff to amend the petition and offer further evidence in support thereof, be and it is hereby, overruled, To which the plaintiff asks and is allowed exceptions.

RALPH E. CAMPBELL, Judge.

(Decree, March 4, 1918.)

Now on this 4th day of March, 1918, this cause coming for further hearing and signing and entry of final decree herein pursuant to trial had on March 15th, 1917, plaintiff and defendant each then appearing in person and by counsel, whereupon both parties in their order produced their evidence and rested, and after argument of counsel the cause was taken under advisement by the court upon briefs of counsel thereafter filed and considered by the court, and the court now being fully advised in the premises finds the issues for the defendant and that the plaintiff is not entitled to the recovery prayed in the bill.

It is, therefore, ordered, adjudged and decreed by the court that the plaintiff take nothing by this action; that his bill be dismissed, and the defendant have judgment against the plaintiff for his costs herein taxed in the sum of \$. To all of which final order, judgment and decree the plaintiff asks and is allowed his exceptions.

RALPH E. CAMPBELL, Judge.

105

(Statement of the Evidence.)

(Filed in the U. S. District Court, November 19, 1918.)

Now on this 15th day of March, 1917, at Vinita, within the Eastern District of Oklahoma, came on for hearing before the Honorable Ralph E. Campbell, Judge, the above entitled and numbered cause; whereupon there appeared on behalf of the complainants, A. Scott Thompson, Esq., and H. W. Curry, Esq.; and appeared on behalf of the defendant, Paul Ewert, Esq., pro se, and W. H. Kornegay, Esq., and the parties proceeding to trial hereof, proceedings were had as follows:

Mr. Curry: The plaintiff in this case requests the court to rule that under the provisions of the Revised Statutes of the United States, Section 2126, the burden of proof is on the defendant, a white man.

The Court: The record may show that the court hold that the burden of proof in this case is upon the plaintiff, notwithstanding motion of counsel based upon the statute cited; and exceptions noted.

106 Evidence on Behalf of the Complainants.

GEORGE REDEAGLE, being called on behalf of the complainants, being first duly sworn, testified under oath as follows:

Direct Examination

By Mr. Thompson:

- Q. What is your name? A. George Redeagle.
Q. How old are you, Mr. Redeagle?
A. I am neighborhood of 50.
Q. What tribe of Indians do you belong to?
A. Quapaw.
Q. What degree of blood are you, George?
A. Fullblood.
Q. Do you know Charley Bluejacket? A. Yes sir.
Q. Is he living or dead? A. Dead.
Q. Did you know his son Wolly Bluejacket? A. Yes sir.
Q. Is he living or dead? A. He is living.
Q. Wolly Bluejacket? A. No, Wolly is dead.
Q. Know about when he died, Mr. Redeagle?
A. Not exactly, I don't remember.
Q. How old was he when he died, about?
A. I don't remember that.
Q. Well, was he ever married?
A. Oh, probably 12 or 13 years old, I reckon.
Q. He was not a married boy, was he? A. No sir.
Q. And do you know who his mother was? A. Yes sir.
Q. What was her name? A. Carrie Bluejacket.
Q. And she is living, is she? A. She is living.
Q. And his father was Charles Bluejacket?
A. Yes sir.
Q. Did Charles Bluejacket die before this boy died?
A. Yes sir.

Mr. Thompson: I take it, Mr. Ewert, that there is no contention that these parties who made you the deed were not the lawful heirs; you admit that in the bill.

107 The Court: If it is admitted by the pleadings, it will be taken as true.

Mr. Thompson: The only denial, I think, was as to the heir; one of the minor grantors had died since Mr. Ewert's

deed was made, and suit was brought in the name of his mother, who would be his heir.

Mr. Ewert: I don't know anything about that, Your Honor.

The Court: Now, let me understand this, without putting this in the record—well, you may put it in the record if you desire; first, now, which one of the minors is it, whose deed—this is Charlie;—

Mr. Thompson: No.

The Court: Willie Bluejacket is dead, unmarried, and his mother was Carrie Bluejacket, she is alive?

Mr. Thompson: Yes sir.

The Court: His father was Charles Bluejacket and he died before his father—

Mr. Thompson: Yes yes.

The Court: Willie Bluejacket is the boy who died since this transaction. Now, who besides the mother stands as his heir?

Mr. Thompson: I wouldn't understand that it is anyone but his mother.

The Court: Then the mother stands in this case as the heir—Carrie Bluejacket?

Mr. Thompson: Yes sir. I believe that is all.

Witness dismissed.

108 And thereupon, A. W. ABRAMS being produced as a witness on behalf of the complainant, sworn and testified under oath as follows:

Direct Examination

By Mr. Curry:

Q. What is your name? A. A. W. Abrams.

Q. Where do you reside, Mr. Abrams?

A. One mile and a half, about, north of Lincolnvillle, in Oklahoma.

Q. On a farm? A. Yes sir.

Q. Are you a farm owner?

A. I have my allotment; isn't much farm on it; allotment of 240 acres.

Q. How long have you lived in Ottawa, Oklahoma?

A. Since the 10th of October, 1887.

Q. What has been your business?

A. For several years I farmed and stock raised and did quite a lot of leasing of land; writing for the neighborhood, notary public for four years. Later I was engaged in mining, prospecting, or wild catting it was on the start; found some ore. I am still doing a little of that.

Q. In what particular district?

A. What was known as the Sunnyside district, up there north of Lincolnville.

Q. In your business would you have dealing more or less with Indians?

A. I was clerk of the Quapaw Council and am yet; have been since the first Council after I reached there in '87.

Q. Did you at any time occupy an advisory position with the Indians, or were you in the habit of being consulted and advised with by the Indians in your community?

A. Well, yes; yes sir.

Q. How extensive was your acquaintance with the Indians in Ottawa County, Oklahoma.

109 A. Well, with only the Quapaw tribe; I didn't counsel with any the others except—that is, not especially; I occasionally did, but with the Quapaw Indians it was almost an every day occurrence for many years.

Q. State whether or not you had anything to do with the allotting of the lands to Indians in Ottawa County?

A. Yes sir.

Q. State what you did.

A. I was one of three in the allotting committee; I headed that committee.

Q. How long were you employed in the work on that committee and allotting land? A. Sir?

Q. How long were you employed in your work on that committee in allotting Indian land?

A. I think the Quapaw Council Act was about April 21, or 23rd, I don't remember which, in '93; I acted in that capacity until the work was terminated by Congress, I think in January or February '95; maybe it was March. Then my mission ended.

Q. State whether or not you had anything to do as the representative of the Indians in recommending to Congress the adoption of the allotment act.

A. I did. I was the delegate to Washington several times, beginning in December '89, and ending with the—probably the March term in '95; I think probably that was the last term.

Q. You mean that you were delegate from the Territory of Oklahoma?

A. Oh, no, no; from the Quapaw Indians, the tribe.

Q. And it was during your work as the delegate that this allotment was passed, as I understand you? A. Yes sir.

Q. That has been how long ago?

A. Well, '93 was when they passed the allotment act
110 by our Council; we soon afterwards began the work of
allotting the land and finished, I think it was terminated by Congress in the session ending in March '95.

Q. Now, from that time, state whether or not you had to do with the Indians in an advisory capacity with reference to their allotted lands and properties thereon situated.

A. Yes sir, I did.

Q. To what extent?

A. Well, they were up to my house most every day and sometimes as many as twenty or thirty would eat dinner with us, so you see how extensively it was.

Q. So you are thoroughly familiar with the Indian character? A. The Quapaw reservation.

Q. Are you acquainted with the defendant Paul Ewert?

A. I have met the gentleman.

Q. When did you first meet him with reference to the time that he came to Miami, Ottawa County, Oklahoma?

A. It seems to me that—of course I have no data on hand—it seems to me that it was in 1908; it might have been in the fall [og] 1907, but I am satisfied that it was in 1908 that I first met him.

Q. At that time state whether you had any of what is known among you people down there as marshal lands; lands to which the deeds had been made by the Marshal of the United States, under some deed of partition?

A. Oh, I never had an acre.

Q. Had none of that?

A. I have never bought an acre of this Indian land.

Q. Tell the Court about how you came to be acquainted with Mr. Paul Ewert in a business way.

111 Mr. Kornegay: Your Honor, we object; I suggest that that is immaterial, it seems to me taking up a good deal of time.

The Court: I don't understand—he may answer. I will see what this is developing.

Mr. Curry: Just preliminary.

A. Shall I answer?

The Court: Yes.

A. It became known to me that he was—that he had said a great many—

The Court: Well, never mind about that. What was the first—what was the circumstance of your first meeting; what transpired there and what was it? Tell the Court about it.

A. I came down to Miami to see him.

Q. On whose invitation? A. Sir?

Q. I say how did you happen to go to Miami to see Mr. Ewert?

A. Won't allow me to answer that because I had heard he was there to—

Mr. Ewert: That is objected to, Your Honor.

The Court: I am going to hear, now, just briefly what he had heard. Answer that question now.

A. It was common rumor around there that he was—that he was after me and my Company on our mineral leases there; we had some mining leases.

Mr. Ewert: I don't understand.

The Court: Common rumor, he was after me and my Company on some mineral leases there.

A. Made special mention of us.

112 Q. Tell what conversation you had with him.

A. I can't repeat that exactly.

Mr. Kornegay: We object, Your Honor.

The Court: What is the purpose of that?

Mr. Curry: The defendant in this case pleads that he came into the district solely to bring certain particular suits with certain deeds known as marshal's deed; seeking to show by this witness that he was included in his suit—in the suits that he was threatening to bring, and that he was talking with the Indians, and that he called this man and other men in, and challenged their dealing with the Indians, and informed them that he was there to bring law-suits generally in relation to any matters affecting the Indians. Also, I seek to prove our allegation in the bill, that it became generally known throughout that whole Quapaw tribe that Mr. Ewert, as a representative of the Government, was not there to protect their rights and bring suits and restore them what they had lost—

Mr. Ewert: Objected to as incompetent, irrelevant and immaterial; not shown that it was within the period of time when this suit was handled or anything of that kind at all.

The Court: Well, I am going to be pretty liberal in this case; I am not prepared to say that I will consider everything that goes in. He may answer, and in order to shorten the record, the record may show if you desire, the record may show that objections to each of these questions is made, without you actually introducing it. The record may
113 show that you introduced the objection to each of these questions, and the objection overruled, and exceptions noted.

Mr. Ewert: Will the objection show as incompetent, irrelevant and immaterial, and no foundation laid?

The Court: Yes, this has relation, now, to all questions relating to representation which defendant Ewert made with regard to his duties as representing the Government in the Quapaw tribe.

Q. Well, the substance of your conversation; what was the substance of your conversation with Mr. Ewert?

A. I [undertood] to explain to Mr. Ewert the truth as to our leases.

Q. Why did you do that? What had been said by him?

A. I went down and introduced myself, knowing and hearing that he was in the neighborhood for that purpose.

Q. What did you say to him in substance? Give it as near as you can, repeating the substance of your conversation; not verbatim, of course, but the substance of what he said and you said.

[Q.] Well, it was in regard to the validity of our leases, the fraud as I heard he had accused me of using.

Q. Did you tell him that you heard that he had accused you of fraud? A. I certainly did.

Q. Tell what you said now.

A. That there was no fraud in it; I would love to be defrauded in the same way. I had land that I would lease him on the same terms, only on better terms.

Q. Did he, or did he not, explain to you why he was making inquiry in regard to your leases, or charging you with fraud?

114 A. No, not that I remember of specifically. The question seemed to be a great deal in regard to the overlapping leases.

Q. Go ahead.

The Court: Let's not go into that; he went to see Mr. Ewert, seeking to show Mr. Ewert as to certain rights. Let's see what Mr. Ewert said.

Q. State if you can what Mr. Ewert said to you without reference to what conclusions you drew from it; state what he said as near as you can.

A. That they were fraudulent.

Q. Said what?

A. Said that my leases were fraudulent on the face of them; that they were illegal; that the Government would go into court to set them aside.

Q. Well, that was your first conversation?

A. That was probably the drift of several conversation.

Q. How many times did you go to see him if you know approximately?

A. I can't tell the number. It was many times.

Q. Now, when you went to see him and saw him in his office, state whether or not there were other Indians in there.

A. Oh, generally from two to several.

Q. You spoke of the first conversation you had with him; go to the next conversation if you can remember when you [say] him again and how long apart the two conversations were?

A. I can't tell just how much time intervened because I went several times. I tried to make friends with the man and show him that our leases were alright.

Q. Well, what was the next conversation you had with him? Do you recall him ever sending for you to come to his office?

A. Oh, yes, he was up to my office two or three times.

Q. What did he come to your office for, and what did he say when he came up there?

115 A. He came once with—to copy a lot of my records and books as to accounts on Charlie Quapaw's mining business; he began no place and ended no place but he took a lot of my records in that way which I was perfectly willing for him to have.

Q. Well, what did he say he got them for?

A. I suppose to use before the court.

The Court: What did he say?

Q. What did he get them for?

A. To use before this court; send to the Government.

Q. State whether or not, Mr. Abrams, he said he was going to use them in court?

A. I can't exactly state his language, but to be used in these law suits against us.

Q. Do you know whether or not any suits were subsequently brought in regard to these leases, the descriptions of which he had gotten from you?

A. I don't know that he used them in the—

Q. Do you know whether there was a suit brought on that Black Hall land by Mr. Ewert in regard to some leases?

A. Yes.

Q. About what year was that in?

A. I can't tell whether it was in—it seems to me that it was in nine; tried by Judge Campbell.

Q. Was you made a party to that suit?

A. I think I was.

Q. Was that the case of the United States vs. Noble and others? A. Yes sir.

Q. That went to the Supreme Court of the United States?

A. Yes sir.

Q. Do you remember of seeing and talking with Mr. Ewert in his office in the presence of Mr. Redeagle?

A. Yes.

Q. When was that?

A. Now, I can't tell whether it was in—it was sometime in the fall, winter or very early spring; it was either 116 in the late fall of 1908, or very early in the spring of '09.

Q. Now, how did you come to go to his office that time?

A. He sent for me; 'phoned for me that he wanted me to come down, or wrote me, I don't remember which.

Q. You went down in response to his request?

A. I did.

Q. Who did you find in his office when you went there?

A. George Redeagle and his sister.

Q. State the conversation as near as you can had with yourself and Mr. Ewert.

Mr. Ewert: Objected to as incompetent, irrelevant and immaterial; show what the conversation was about.

The Court: Overruled; he may answer.

Mr. Ewert: Exceptions.

The Court: Now, let me ask you: had this relation to the Carrie Bluejacket case that you are trying?

Mr. Curry: Yes sir.

The Court: Alright.

A. There was no business of any kind talked of on the start, only a few generalities; he finally asked me if I knew about the Hully Blackhall land up here, I said I did. I can't remember, of course, verbatim.

Q. Give the substance of it.

A. As near as I can, he asked me what that land was worth; I said twenty-five dollars an acre—

Mr. Ewert: Now, we move that all that be stricken, Your Honor, as incompetent, irrelevant and immaterial; nothing whatever to do with this case.

The Court: Overruled.

Mr. Ewert: Exceptions.

117 A. He asked me what I would give for that land and I said twenty dollars an acre; he says it is worth twenty-five, why wouldn't you give twenty-five? I think that my answer was that I am not swapping dollars. I know where I can place that land at twenty-five dollars before sundown, or before Saturday night, or something like that, which I did.

Q. Well, what if anything, did you say to Mr. Redeagle in the presence of Mr. Ewert there, in regard to that land?

A. I advised Mr. Redeagle as I had a hundred times before not to sell land.

Q. Well, what did you say to him? That is a mere conclusion of yours; what did you say to Mr. Redeagle? I didn't ask you to repeat the language, but the substance, to Mr. Redeagle in Mr. Ewert's presence.

A. Well, I said to George, I don't advise you to sell your land; I advise you to keep it. Word to that effect now; I said you will spend your money; I think I made this remark: it will be like a chunk of ice set out in the June sun; at night there will be nothing but a wet place. You will have nothing for it and I think I went on and said further, I will tell you what I will do, George, I will give you two hundred dollars a year for that land for all time and you keep the land.

The Court: Put me straight as to what this Blackhall land is.

Mr. Curry: Involved in the Redeagle suit.

The Court: How does that come in this case?

Mr. Curry: It comes in this case if Your Honor please upon our theory of the case, upon this proposition: Mr. Ewert denies that he was making general—giving general notice out to these Indians that he was assuming guardianship over these Indians and specifically pleads now
118 that he had a particular business relating to a particular thing, and that he adhered to that. Now, the charge is that he exercised undue influence over these Indians by

means of having it generally known that he was the protector of them, the Government, and spoke for the Government in protecting the Indians. Now, I think on that theory, independent of the suits, we will be entitled to show other specific acts as you do in order to prove fraud. You may prove other similar frauds happening about the same time, although they are not of the exact same nature, for the purpose of showing the intent of the parties and the purpose they had in doing certain things.

The Court: Well, I will follow this a little further.

Mr. Ewert: Kindly note our exceptions.

The Court: Exception noted.

Q. Now, are you familiar with the Bluejacket land in controversy in this case? A. Yes sir, I am.

Q. How long have you [know] that land?

A. About 28 years or something like that.

Q. How far is the Bluejacket land from your allotment?

A. Well, I have never lived on my allotment; I am living within about one mile from the nearest corner of the Bluejacket land.

Q. You have known the Bluejacket land for about how long? A. About 28 or 29 years.

Q. What if anything has been done on the Bluejacket land in regard to mining, and about when was it done?

119 Mr. Ewert: Objected to as incompetent, irrelevant and immaterial for this reason—

The Court: What is your purpose? I don't see the drift of that unless it be [—] establish the value of the land; it is admitted that the value of the land here present is sufficient to—

Mr. Curry: I am going to undertake to show that the land had been sufficiently developed to give it a mineral value at the time this land was sold, and will probably be able to show by admissions here, that the Secretary of the Interior did not know the status of that—

The Court: Well, suppose he didn't know it, unless it appears that Mr. Ewert had something to do with his not knowing it, how does that connect Mr. Ewert in this case?

Mr. Curry: Independent of his relationship to the Government, it might not.

The Court: Your theory being that his relationship with the Government was such that he should have advised the Secretary in regard to this situation?

Mr. Curry: That certainly is my theory, independent of the statutes he came down here to represent these Indians and bring suit as the evidence shows he did, and it became his duty to notify the Secretary of the Interior, especially if he was going to buy the property.

Mr. Ewert: Objected to as irrelevant, incompetent, and immaterial.

120 Mr. Curry: Of course, the evidence we are offering would be admissible on the grounds of an accounting, we are asking for an accounting—

The Court: I will hear your objection now.

Mr. Ewert: For this reason, that the value of the land at the time the purchase was made is absolutely immaterial because under the rules and regulations promulgated by the Secretary of the Interior of the United States, which are attached to the answer in the case, it becomes the [duth] of the Secretary of the Interior of the United States to appraise those lands at their full value, and the appraisement is made by the Secretary of the Interior of the United States; and it would be immaterial whether these lands were worth one hundred dollars per acre or twenty-five dollars per acre, the appraisement of the Secretary of the Interior stands as the appraised value for all the world, and what the value of the lands actually were, cannot possibly come into this case, because the value is fixed by the Secretary of the Interior when he submits it to the world and places the appraisement on there, and anybody who bid before that presumption is subject to the approval of the Secretary and may purchase—

Mr. Curry: I want to suggest that this circuit held in the Bell case held that the acts of the Secretary of the Interior approving a deed or fixing values or anything of that kind, where he did not have sufficient before him to justify, his decree would be set aside.

121 The Court: Well, but that is not charged in this case, I am called upon in this case to set aside this transaction because the Secretary did not have all the evidence before him.

Mr. Curry: That is true.

The Court: I take this case just as if the Secretary had had all the evidence that was available, except on your theory, that it was Ewert's duty as an officer of the Government to advise him with regard to it, and that was against the law for him as an officer of the Government to make a purchase. Now, so far as his relation to the Government is concerned, it doesn't make any difference under your theory, whether he paid a sufficient amount or not, whatever the land was worth, he could not purchase it. That is true, isn't it?

Mr. Curry: Yes, that is true.

The Court: Now, so far as his duty to advise the Secretary with regard to the value of the land is concerned, I don't think that his status has been shown to be such that at this stage of the case any such duties devolved upon him.

Mr. Curry: Well, suppose that is true, but suppose he had—suppose it is shown here that he had knowledge even, of a prospective value in this property and he is under disability, not disability of the statute, but suppose he is under any kind of disability, suppose he is in a position where equity charges him with disability to purchase because of his fiduciary relations to this land, then the value of that property if any prospective value, is admissible in evidence for
122 the purpose of impeaching—

The Court: Yes, but I will sustain the objection now until that fiduciary capacity appears from the evidence.

Objection sustained.

Mr. Curry: We except. If I understood the ruling of the Court, it is that we will not be permitted to show the actual value of this land at the time it was purchased?

The Court: I will not permit you to go into that now until there is something more in this case to establish what you claim to be the fiduciary relation of this defendant.

Q. Since the early part of 1909 you have been familiar with this Bluejacket land, have you?

A. Yes, right along.

Q. Are you familiar with the rental values of lands in that neighborhood and vicinity? A. Yes sir.

Q. What, in your opinion, is the rental value per year or per month of this Bluejacket land, since the early part of 1909?

Mr. Ebert: Objected to as irrelevant, incompetent and immaterial; no foundation laid to show that he knows this land or the value of it for agricultural purposes.

The Court: Sustained.

Q. Do you know the description of this land?

A. Not right at my fingers ends.

The Court: Do you know this piece of land as a piece of land out there; have you been on this land?

A. Oh, yes, many a time.

123 Q. How much of it is bottom land, if you know?

A. Well, I think that over half was bottom land.

Q. And how much of it, if any, is mining land, and how much of it, if any, has been mined since 1909?

Mr. Ewert: Objected to as incompetent irrelevant and immaterial.

The Court: Overruled; exception noted.

Q. Can you answer that?

The Court: You may answer.

Q. How much of the land has been mined, if any since 1909?

Mr. Ewert: Same objection.

The Court: Overruled.

Mr. Ewert: Exception.

A. There is one mine that has been worked on it for quite a while.

Q. Just now it is not in operation?

A. Not in operation.

Q. Have you been over the land when crops was growing on it? A. Oh, I have been.

Q. Passing around it and seeing it?

A. Yes, I have passed it and around it but not over all of it.

Q. Do you know anything about the quality of the soil of that land?

A. Oh, it is good; bottom land—is good.

Q. Of the bottom land—how much do you say is in bottom?

A. I think over half of it.

Q. Does that over-flow bad?

A. Occasionally it does overflow but I think it has not recently; maybe it did last year for a little while.

Q. Is a part of the up-land farmed?

A. No, I think not; I don't think there is any farm on the up-land part.

124 Q. How much of it is in timber of you know?

A. There is probably fifty or sixty acres. It is not timber, it is scrubby; it is not very good.

By the Court:

Q. You may answer this question—now, answer this question now, in order to get to the particular point; do you know about the rental value of this land about which you have been interrogated since the year 1909? You may answer that yes or no—do you know what its rental value has been from year to year since that time?

A. May I explain there is [twon] kinds of rental—grain rent and cash rent.

Q. Well, as to the grain rent.

A. One-third is what we all as a rule take.

Q. And as to cash rent?

A. From two to three dollars an acre.

By Mr. Curry:

Q. Annually? A. Yes sir.

Q. Mr. Abrahams, you say that you were practically acquainted with all of the Indians of the Indian tribes—that is the Quapaw Indians? A. I know all of the Quapaws.

Q. You have, prior to the time Mr. Ewert came to Miami as Assistant United States District Attorney—to the Attorney General you say you had had extensive dealing with the Indians, dealing with them as an advisor? A. Yes.

Q. State whether or not you had had since Mr. Ewert's come there sufficient information, by association and talking with the Indians, so as to form an opinion as to the influence and character of influence that Mr. Ewert exercised over those Indians by virtue of being known as Assistant

125 United States Attorney to the Attorney General?

Mr. Kornegay: We object to that, Your Honor, as being incompetent; we object to it as being immaterial.

The Court: Objection sustained.

Mr. Curry: We except. Can we follow that by making the offer—

The Court: Yes, you may put that in the record.

Mr. Curry: We offer to show by the witness on the stand that up for many years prior to the time that Mr. Ewert came to the—to Miami, as an Assistant United States District—as Special Assistant Attorney General of the United States

that he had been—that the witness had been occupying an advisory capacity towards a very large number and proportion of the Quapaw Indians; that after the defendant came to Miami and was known—the Indians as United States Attorney—Special Assistant United States Attorney, the Indians in large numbers went to his office in the city of Miami; that the defendant [challenged] the rights of this witness to deal with these Indians in relation to their land, and undertook to and did specify the kind of lease, mining leases, that he should or could take from the Indians, and that the Indians immediately became—

The Court: Now, let me see; your question was directed to this special matter as to whether this man was able to express an opinion with regard to the influence of the defendant upon these Indians?

Mr. Curry: Yes, Your Honor, but you had previously cut me off from showing that by direct statement—how the relation between he and the Indians had ceased, when
126 this fellow appeared upon the scene; a man might exercise the—

The Court: Well, your question to which the objection was sustained indicated a desire to have this witness express his opinion as the existence of that influence.

Mr. Curry: Yes.

The Court: I don't think that his opinion was competent. If there was a certain influence exercised by Mr. Ewert that would be for the Court to determine as to certain things done which might influence the Indians. These are matters of fact which might or might not appear in the evidence.

Mr. Curry: I think we are entitled to show by this witness the change of attitude of the Indians towards their advisor, and that they turned to the District Attorney for advice, or to the defendant for advice, as a circumstance pointing to the fact that he did obtain and have an influence over these Indians.

The Court: Well, that will [develope] from what transpired after the defendant came there. Any opinion that this witness may have in regard to its effect—

Mr. Curry: I will ask a different question; I didn't understand the Court a while ago.

Mr. Ewert: May I ask, when you use the word Indian, what Indians you refer to?

The Court: Put the question again and we will see.

Q. Mr. Abrahams, to what extent, if any, were you
127 advisor to the Quapaw Indians, prior and up to the
time that Mr. Ewert came to Miami as Assistant
the Attorney General of the United States?

The Court: Now, I think he has gone all over that; I think
you questioned him in regard to that heretofore, up to the
time Mr. Ewert came there.

Q. Well, what happened with reference to your relation
the Indians following Mr. Ewert's coming to Miami?

Mr. Kornegay: Your Honor, we object as being incompetent,
irrelevant and immaterial. I think we are not trying
the proposition now, it seems to me, as to who had the biggest
influence, the witness or the defendant, and it does not belong
here.

The Court: Objection sustained.

Q. Do you know—you may answer this yes or no—do you
know whether or not there appeared in the newspapers, published
and circulated in Ottawa County, frequent references
to Mr. Ewert as the Assistant—as an Assistant to the Attorney
General of the United States? A. Yes sir.

Mr. Kornegay: That is objected to, Your Honor, as incompetent,
irrelevant and immaterial.

The Court: The objection sustained.

Mr. Ewert: I move that the answer be stricken out; he
has already answered.

Mr. Curry: He answered that he knew.

The Court: I see the gist of the examination—

Mr. Curry: It is suggested that it might be proper to ask
[there] Court here if the Court—whether or not the view would
be that we are not entitled to show by newspaper publication
128 lication and the fact that they were circulated among
the Indians, his influence over the Indians? It might
save us from bringing—

The Court: At any rate unless these newspapers and publications
are brought home to Mr. Ewert, in my judgment
[there] have no place here.

Mr. Curry: We expect to bring them home to Mr. Ewert
of course, but we think we can do that.

The Court: I am not going into that until they are brought home to him, at any rate; general newspaper statement.

Cross-Examianition

By Mr. Kornegay:

Q. Mr. Abrahams, you were speaking a while ago about Mr. Ewerts having had something to do with the Noble case, and you had something to do with it; who are the other defendants in it? A. Something to do with what?

Q. Who are the other defendants in that Noble case?

A. I think it was Noble, Thompson and others, was the way it was headed.

Q. What Thompson was that?

A. Doctor Thompson, a dentist at Baxter.

Q. Scott Thompson in it?

A. Oh, no, I don't think he was in it at all; if he was I didn't know it.

Q. Well, he was a defendant in the Blackhawk case, wasn't he—Mr. Scott Thompson?

A. That went back to a division of royalties—I hadn't a thing in the world to do with that. It appeared that Mr. Bun Thompson was Mr. Blackhawk's attorney, and Mr. S. H.—Sam Smith of Baxter, was Mr. Cooper and Noble's attorney; they made a settlement—

129 Q. Well, I don't care for that; do you know whether Mr. Scott Thompson is one of the defendants in either one of those cases? A. No sir, not that I know of.

Q. Coming now in regard to the land—

A. If he was attorney, I don't know nothing about it.

Q. Well, getting to something else now—coming to the land you testified about; you say about half of it was scrubby oak land and the other half bottom land?

A. No, I said about a half of it more or less was up-land and about half of it bottom land.

Q. About how much of it was scrubby oak land?

A. I think about fifty or sixty acres as near as I can get to it.

Q. Where is the mine located?

A. A good part of that scrubby land is on the west of it.

Q. How long has it been abandoned?

A. Since about August, I think, or September of '16.

Q. When was it worked? A. Sir?

Q. When was it worked?

A. Well, I can't tell about that; I never went about it, only about the time it closed down.

Q. Do you know what this land has actually rented for since 1909, in any one year?

A. No sir, that is out of my business.

Q. You don't know anything about it?

A. I don't know.

Q. Have you seen it since 1909? A. Oh, yes sir.

Q. How often are you over there?

A. I pass by the west side of it, and north side of it every day or two, along the lane.

Q. Do you know anything about the land adjoining it and what that has rented for?

A. Not as agricultural land, I don't. I paid no attention to my neighbors.

130 Q. And you don't know anything about what the land itself is actually rented for that is in controversy about which we are questioning? A. Which land?

Q. Why, the Bluejacket land.

A. No, I don't know what the contract says between me and Mr. Ewert.

Q. You were a person with a good deal of importance with the Indians up there, I believe? A. Not now.

Q. You were at one time? A. Yes sir.

Q. Are you an Indian or a white man? A. Sir?

Q. Are you an Indian or a white man?

A. I am about one-third French, about one-third Dutch Jew, and about one-third Indian.

Witness dismissed.

Mr. Thompson: Your Honor, I think it is admitted by the pleadings that this land was duly patented to Charles Bluejacket, but a denial or at least an allegation that they are not familiar with the form of the patent, sufficient to admit the form that we set up; so I offer as evidence a certified copy of the patent to Charles Bluejacket.

The Court: Certified copy of the patent to Charles Bluejacket is admitted. I take it it is not objected to?

Mr. Kornegay: No sir.

131 And thereupon, W. M. SMITH being called as a witness on behalf of the complainant, sworn and testified under oath as follows:

Direct Examination

By Mr. Thompson:

Q. State your name? A. W. M. Smith.

Q. Where do you live, Mr. Smith?

A. Baxter Springs, Kansas.

Q. How old are you? A. Thirty-six.

- Q. Married man? A. I am.
- Q. How long have you lived at Baxter Springs, Kansas?
A. Since 1909.
- Q. Do you know Mr. Paul A. Ewert? A. Yes sir.
- Q. How long have you known him?
A. I think since early in the year 1909.
- Q. What has been your business in Baxter Springs? You came there in 1909? A. Principally farm leases.
- Q. Dealing in farm leases?
- A. Dealing in farm leases and hay and grain.
- Q. In what locality?
- A. In Ottawa County, Oklahoma, in near Lincolnville, and near Quapaw.
- Q. Dealing with Quapaw Indians?
- A. Directly with the Indians, yes sir, considerably.
- Q. And the Quapaw Indians particularly?
- A. Quapaw Indians, yes sir.
- Q. Are you acquainted with a great many of the Quapaw Indians? A. I am.
- Q. Are you familiar with the location of the land known as the Charles Bluejacket allotment of land? A. I am.
- Q. I wish you would describe to the Court if you can how that land lays and the quality of the soil, and so forth.
- 132 A. I would like to ask one question, does it cover two hundred acres?
- Q. Yes sir.
- A. I know how it lays but I don't know whether Mr. Ewert bought it all or not.
- Q. Yes sir, two hundred acres.
- A. I would judge that half of it is bottom land, and second bottom; it might be—wouldn't hardly be classed as up-land; half is bottom and second bottom.
- Q. How is that bottom land with reference to the quality of soil?
- A. Well, I consider that river bottom in the bend, as rich as any bottom land along Spring river; very rich.
- Q. Since you have been employed or been engaged in the business of taking [fram] leases and hay leases in that community, have you become familiar with the rental values of land of this character? A. Yes sir.
- Q. What is this land in your judgment worth per acre per year [sine] the year 1909?

Mr. Ewert: Objected to as irrelevant, incompetent, immaterial; no foundation laid to show his knowledge of this particular land, or lands in that vicinity.

The Court: Sustained.

Q. Have you been upon this land, Mr. Smith?

A. I have since 1909, several times.

Q. About how many times?

A. Possibly as many as five times.

Q. Have you been upon the land recently?

A. Yes, within the last year.

Q. Then I ask the question again, what is your information, what in your opinion would be the fair rental market rental value—

133 The Court: You mean the fair cash rental value?

Q. I was just getting at that; the fair cash rental value per acre per year since the year 1909?

A. Well, from 1909 to about 1913, the bottom land should have rented for, from anywhere from two to three dollars an acre; and the upland that is not prairie grass, those years would have brought a dollar or a dollar and a quarter probably, judging from the rents I paid on other farm leases; and since that time it would have brought—bottom land, would have brought three dollars [and] an acre, I would judge, and a year or two, the up-land should have brought as much as two or two and a half an acre. The grass land, I would judge it would be worth about a dollar and a half an acre, up-land high land,

Q. Can you state to the Court about how much of the land is in hay?

A. I think there is at least forty acres, and some of it is used for pasture.

Q. And how much can you say was in this bottom soil?

A. Well, the bottom and second bottom, I would judge as close to a hundred acres.

Q. Have you been associated with anybody in Baxter Springs during the time you have been in the hay business?

A. Yes sir.

Q. Who was that? A. W. T. Apple.

Q. Have you ever had any correspondence with Mr. Ewert?

A. I think I have.

Q. I [have] you a letter which I ask—

A. He has written me, I think I answered one or two of the letters.

Q. I hand you a letter which the reporter will be asked to mark plaintiff's exhibit two, and ask you to state, to examine this exhibit, and state to the Court whether or not you received that letter in the ordinary course of the mail? A. Yes sir. I did.

Q. You know the signature attached thereto? A. I do.

Q. Whose is it?

A. Paul A. Ewert's, Special Assistant to the Attorney General.

Q. And what is the date of that?

A. January 19th, 1909.

Mr. Thompson: Now, if Your Honor, please, we have some letters here and we will want to use them in each case. I assume we can let them go in this record, and afterwards be copied and considered in the Redeagle case?

The Court: They can be introduced now, and application for use in the other case—they may be offered, rather.

Mr. Thompson: We offer these in testimony at this time.

The Court: It is only five minutes to the noon hour gentlemen; I want to examine some of these authorities, and will during the noon hour. We will proceed no further now but take a [recess] until two o'clock.

And thereafter court convened pursuant to adjournment and further proceedings herein were had as follows:

The Court: There was an exhibit offered before the noon hour, which was being examined by counsel——

Mr. Ewert: No objection to the letter as a letter, but it is objected to as being incompetent, irrelevant and immaterial; it is incompetent because—and is immaterial under
135 this sale, in my judgment, because the sale was one which was made through the office of the Secretary of the Interior.

The Court: Perhaps I had better see it and then hear you on it. This has no relation to this case. I have given this matter some careful consideration during the noon hour. I understand a little more definitely than I did on the other presentation this morning, just what there is in this proposition. I have read very carefully the petition, or bill, in this case. It seems to be based upon three separate propositions: first, that the defendant Ewert was incapacitated to buy or deal in this land from the Indians under the provisions of the revised statutes to which my attention was called, because of his official position with the United States, that, as pleaded, of a Special Assistant Attorney General, acting under a special commission from the Attorney General of the United States. It is further insisted that this transaction should be set aside because the defendant discouraged competitors; interfered with persons who were inclined to bid more for the land and secured his own bids as the sole bid because of his discouraging other bids. Third, that certain of these plain-

tiffs who were minors at the time of the transaction, that as to them the proper steps had not been taken in the probate court to warrant the passing of title to this property. Now, we are proceeding upon that phase of the case which relates to Mr. Ewert's official position with the United States. It is alleged in the petition, as I say, that he is a Special Assistant Attorney General of the United States, under special appointment from the Attorney General. He, in his answer, admitted his official connection with the Government as Special Assistant Attorney General, and has set up what he states in his letter of commission. To that extent his admission is admitted. Now this land was sold under the Act of Congress of 1902 which permitted these lands of the heirs, belonging to the heirs, of these Indian allottees, to be sold with the consent of the Secretary of the Interior. Pursuant to that Act, written rules and regulations were promulgated by the Secretary. Those rules and regulations are attached to the answer of the defendant and I examined it. I assume that they correctly set forth the rules and regulations which relate to this Act. The Court takes judicial knowledge of such things, but of course has to have them before him to know the details of them. Is there any question that these rules and regulations set forth in the answer—as to whether they are correct?

Mr. Thompson: I don't think there is any question. We haven't examined these carefully but we are not raising any question on them.

The Court: Now, your petition in the case alleges that the land in this case was sold according to these rules and regulations; that a petition for the sale of these lands was filed with the Indian Agent, and that the lands were sold to the highest bidder, and that the deed was approved by the Secretary of the Interior. You are basing your attack, so far as the defendant's official relation is concerned, on the fact, on the ground, that he was prohibited from buying because he was such Special Assistant Attorney General. Now, that is a question of law. After his official connection with the Government is established, then it becomes a question of law as to whether or not he is prohibited by the Act upon which you rely. Now, you say he was specially commissioned; if he was specially commissioned, his commission will determine what his activities were to be; not what newspapers said about him; not, in my judgment, what he himself may have assumed, or may represented to others. If he assumed to have duties which his commission really did not give him, in my judgment that cut no figure in this case so

long as it doesn't appear from the pleadings that whatever assumption he made had anything whatever to do with the sale of this property or affected in anyway the sale of this property under the rules and regulations provided by the Secretary. Therefore, it seems to me that on reflection that letters of this character as to what he did or what he directed—assumed to direct others to do in the line of what he conceived to be his duty, is not material here and that we are but encumbering the record with a whole lot of stuff that has no place in the record. On this feature of this case relating to Mr. Ewert's official connection with the Government, you may show if you can see that it was different—that he had a different commission from the one he has admitted here in the answer, that may be shown. I think what the Court should know in this case is just what was his official status; not what he said it was; not what he represented it to others, because it doesn't appear that these Indians petitioned to be allowed to sell their lands because of anything which
138 he did. It is true the plaintiff urges—contends that it was Ewert's duty to advise the Secretary of the Interior with regard to the value of these lands; as to whether that duty was imposed upon Ewert, certainly must be determined from a consideration of what his official connection with the Government was; not what he said it was but what it really was; and I am inclined to think that we are rambling now—

Mr. Curry: If the Court will allow me, I would like to briefly state our views; just at this point—I just wanted to state briefly: this is not a suit to recover the penalty. The primary question involved here, although we have not used the term, is contrary to public policy for Mr. Ewert to make the purchase. Now, our view is that even though he had a limited commission, if he assumed to have a broader commission, then acts that he did within the [pervue] of his assumed authority tending or bringing about any breach of the policy fixed by the Government, it would be contrary to public policy.

The Court: How would it have any relation to this particular transaction?

Mr. Curry: It would in this way: suppose he assumed to go to Miami and had no authority at all; but he advised—put up a United States flag over his office and advertised that he was commissioned by the Government to protect the Indians and that got circulated among the Indians; then suppose the Government makes a sale, not brought about [—]

him at all, and he goes and bids. Our view of the law
139 is, and I think we are sustained by the authorities, is
that his act in having brought about that condition,
having brought about that impresison in the minds of the In-
dians that he did have authority and was protecting them,
would be as contrary to public policy as though it was speci-
fically forbidden by an express statute.

The Court: But I can't see how it could have any rela-
tion to this express transaction, because the law [befor] Mr.
Ewert came there provided how this Bluejacket could sell
this land, by petition to the Indian Agent. Mr. Ewert comes;
he makes all sorts of representation; those reports have no
relation so far as the pleadings show, to this petition. These
Indians petitioned the Indian Agent, or the Secretary of the
Interior through the Indian Agent, pursuant to the rules and
regulations for authority to sell this land; that petition was
entertained by the Secretary of the Interior; pursuant to the
rules and regulations, the Indian Agent was directed to ad-
vertise as provided; to accept bids; to appraise the land,
which he did; that appraisal was presumably [was] submitted
to the Secretary pursuant to the regulations; the bids were
accepted, as you say, the bid from Mr. Ewert, the highest
bidder, was accepted and the land sold to him. Now, you
charge no connection of Ewert with this transaction unless it
be his failure to do what you say he ought to have done, ad-
vise the Secretary of the Interior that the price that he was
bidding was not sufficient.

140 Mr. Curry: We have asked the question on the theory
that it would be analogous to an administrator who
comes into court and makes application to have land of his
ward sold * * * *

The Court: I shall have to rule out anything of a general
nature, and the objection to that will be sustained.

Mr. Curry: Well, we will make an offer.

Mr. Thompson: We might shorten this, Your Honor, by
submitting all these to counsel and offering them at one time.

The Court: Are they all of the same character?

Mr. Thompson: Yes sir.

The Court: Same general character?

Mr. Thompson: Yes sir.

The Court: Well, unless you gentlemen want to take time
to examine them, you may note your objections and I will rule
them out on the statement of counsel.

Mr. Kornegay: Well, we desire to [objection] to the introduction in evidence of each of the letters for the reason that the contents of these letters are immaterial, irrelevant, and incompetent in the matter under inquiry.

The Court: The objection is sustained and exceptions noted. Let them be identified by letter or some other mark. Now, I am assuming that you are correct in stating to me that they are letters similar to the one offered?

Mr. Thompson: They are.

The Court: Relating to his activities in the removing of clouds from the land?

141 Mr. Thompson: Yes sir.

The Court: Cancelling of these leases?

Mr. Thompson: They are letters of the same character.

The Court: Alright.

Mr. Thompson: The plaintiff offers for identification the letters marked plaintiff's exhibit 2, which has been previously offered, and asks the stenographer to mark each of them for identification plaintiff's exhibits, respectively, 3 to 9. I suppose it is agreed that these letters, Mr. Ewert, were written by you?

Mr. Ewert: Yes sir, it is admitted that those are the letters written by me.

The Court: It may be noted in the record then, that the genuineness of these letters is not questioned but that they are objected to on the grounds just stated in relation to the letter offered, and that objections are sustained and plaintiff's exceptions are noted.

The Court: Any cross-examination of this witness?

Mr. Kornegay: No questions, Your Honor.

Witness dismissed.

Mr. Thompson: Your Honor, that will practically end our case, except the identification of some [newspapers] articles furnished by Mr. Ewert and we want to make an offer of those. I suppose under Your Honor's ruling they will not be admitted?

142 The Court: Those are the ones that were suggested this morning?

Mr. Thompson: Yes sir.

The Court: Under the ruling now, they would not be admitted anyhow.

Mr. Thompson: We want to make the offer.

The Court: Well, you may make the offer.

Mr. Thompson: The parties to identify them are not here.

The Court: What about the proof as to the guardian sales?

Mr. Thompson: I think the burden is upon the defendant in that case.

The Court: I don't think. I think the sale is presumed to be regular unless it otherwise appears. It is charged in the petition that there was no order by the probate court authorizing the guardian to make this sale, it is denied in the answer. It is alleged in [thw] answer now, that there was a petition made by the guardian for leave to make this sale and an order by the court granting leave to the guardian to join in this sale.

Mr. Thompson: Yes sir.

The Court: Now, do you concede that there was such order by the Court.

Mr. Thompson: I think so. Our point is this, Your Honor; that that sale is void for the reason that it was not conducted in pursuance to the statute of Oklahoma, and then afterwards submitted to the Secretary, and there is no
143 question of fact—

The Court: Well then, we will assume that the statement—read that answer; possibly you will agree that that—

Mr. Kornegay: Mr. Thompson, you have got the record right there; simply read it into the record and let it go; we have no objection to offer to the record. I understand that is the record disclosed by the books and everything.

Mr. Thompson: I think we can agree without reading all this into the record.

The Court: Let me ask you this; is there in the files there, the original petition on the part of the guardian to the probate court for authority to join in this sale?

Mr. Thompson: I think so.

The Court: Let's get at that now; now, is there any order in the files of the probate court pursuant to that petition?

Mr. Thompson: Yes sir.

The Court: Well now, that may go in. Now then, was that the last transaction in the probate court in regard to the matter?

Mr. Ewert: No sir, the report of the sale.

The Court: Then what is the next step in the probate sale? If there is a report of sale that may be offered.

Mr. Ewert: I would like very much, Your Honor,—they have made so many charges in here, now, the counsel has unusual proof in his possession—I ask that he introduce it in evidence. First the petition for sale; and second, order of sale, of course; third, petition presented to the probate court asking the Secretary of the Interior to sell the land.

The Court: I understand they are ready to be offered now?

Mr. Ewert: Oh, yes.

Mr. Thompson: There is no objection to just offering these papers?

The Court: They may be offered, and then if they are originals and it is necessary, subsequently to substitute copies, that can be done. Let them be admitted.

Mr. Thompson: I suppose it is agreed that they may be admitted and the papers marked plaintiff's exhibit 10, constitute the papers and original files in the case and in the matter of the estate of William, Blanche, Amy and Clyde Bluejacket, minors, and pending in the County Court of Ottawa County, Oklahoma, consisting of the petition by the guardian and the order of the sale made thereon by the Court, and the report of the sale by the guardian to the same Court, and that these papers constitute the only orders made in said cause respecting the sale of said lands described therein?

The Court: Let them be admitted and put right in the record; they are offered and admitted by the Court as a part of the evidence in this case. Now, I understand that those papers now offered, it is conceded, constitute all the record in relation to this transaction in the probate court; that is so far as the petition and orders made of the sale are concerned?

Mr. Ewert: Yes.

The Court: There is no attack on the authority of the guardians, of their appointment, or their capacity to act. Now, have you any other proof aside from the newspaper articles which you want to offer?

Mr. Thompson: I think not, if Your Honor, please.

The Court: Have you any proof on behalf of the defendant?

Mr. Kornegay: Your Honor, at this time, we want to ask the Court, in the nature of a demurrer to the evidence, to find the issues on the proof in favor of the defendant.

Mr. Thompson: We will want to make offer of the newspaper articles and then that will complete our case.

The Court: If you have the party here to offer them; the only things that are to be offered now is the newspaper articles?

Mr. Thompson: Yes sir.

The Court: Do you gentlemen desire to stand upon the proof made by plaintiff and move for judgment for the defendant?

Mr. Kornegay: Well, we desire to say that this is insufficient to entitle him to a verdict and ask the Court at this time to—

The Court: Alright, let the record show that the defendant rests and asks for judgment.

Mr. Thompson: If Your Honor please, we would like to ask permission of the Court to inquire a few questions of the defendant.

The Court: Alright; the defendant will take the stand.

And thereupon, PAUL A. EWERT being first duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Mr. Ewert, you are the defendant in this case?

A. I am.

Q. In your answer filed herein, you set out a copy of a paper purporting to be the permission issued to you on October 23rd, 1908, signed by Charles J. Boneparte, Attorney General, and it shows on its face that you are commissioned

to come to the Quapaw Agency and prosecute suits to set aside certain deeds. You state in the answer just prior to the setting forth of the copy, that you were commissioned to set aside marshal's deeds; at what time did you come to Ottawa County in pursuance to that commission?

A. I took the oath of office, I think on the 10th day of November; I think the commission is on the—I took the oath I think, on the 10th and came to Oklahoma—

Q. What year was that?

A. In 1908; and I went, I think, to Muskogee, and remained there until probably the 25th; arrived in Ottawa County probably along about the—pretty close to the first of December 1908 and sometime during the month of December, 1908, I opened an office after going back to Muskogee and getting office furniture and things of that kind.

Q. You opened an office in Miami? A. In Miami.

Q. Did you have any written instructions from the Attorney General's office? A. No.

Q. As to what you were to do? A. No.

Q. When you arrived in Miami? A. No.

Q. Then, this letter of commission which you set up in your answer, is the only written instructions that you received? A. The only written instructions.

Q. Did you ever receive any oral instructions from the Attorney General's office as to what your duties were in the Quapaw Agency? A. Up to what date?

Q. At any time?

A. In 1910 the nature of my duties was changed but that of course would be immaterial as to—

The Court: What is the date of this transaction?

Mr. Thompson: This deed, I think, was made in March 1909.

The Court: March 1909; now, or 1910—1909?

A. 1909.

The Court: Then, as to what transpired subsequent to the making of the deed would be immaterial.

A. The oral instructions that I received were had—you asked me if I received oral instructions?

Q. You stated that was later.

[—] No, I received oral instructions at the time, before I came out here.

Q. From whom? A. From the Attorney General.

Q. And what were those instructions?

A. Why, there had been a bunch of—I call them a
148 bunch of so-called marshal's deeds; sales that were
made by the United States District Court wherein the
United States Marshals were directed to make deeds to cer-
tain lands. Those suits were instituted and the only suits
that were instituted during the time mentioned here in the
petition by me, and my [appointed] at that time, by agree-
ment I was to be transferred to another line of work. I
was thought then within three months but it dragged out
to a longer period.

Q. Then, these were the only instructions that you had
prior to the time that you took this deed? A. Yes.

Cross-Examination

By Mr. Kornegay:

Q. Mr. Ewert, did the Attorney General at the time that
you made this purchase or before the deed was delivered to
you know of your purchase? A. He did.

Mr. Thompson: Just a moment; I object to that.

The Court: Objection sustained.

Mr. Ewert: The defendant offers to show by himself that
prior to the time that the sale was made—

The Court: Now, just a moment, Mr. Ewert. If you are
going to introduce proof, you might just put it upon the
stand here. You gentlemen suggested that you probably had
nothing to offer. Instead of making your offer, proceed with
your proof, and if there is any objection, I will hear it.

Mr. Ewert: I thought the objection was sustained.

The Court: In relation to this cross-examination.

Mr. Ewert: He asked to put me on the stand for my own
purposes.

Mr. Kornegay: No, Mr. Thompson put him on and on
cross-examination I asked him if he had instructions
149 from the Attorney General.

The Court: I thought Mr. Ewert was proceeding for
the defense to offer some proof.

Mr. Thompson: Now if Your Honor please, I would like
to close this if we can, but I can't do it without identifying
these.

The Court: Have you the newspaper reports here? Let
me see them and see what they are; let them be examined by
counsel. It might be that some agreement may be reached

Mr. Kornegay: Your Honor, I expect this is true, but I don't think it is relevant.

The Court: Well, I have agreed with you on that proposition; I think the record may show that the plaintiff offers these newspaper articles in proof and offers to prove their authenticity, and the—

Mr. Kornegay: We don't concede that we had it but it appears that it is in the newspaper.

The Court: I didn't understand that they purported to be letters from Mr. Ewert. What I had reference to, as to the authenticity, is their proof that they were published in the paper in his, Mr. Ewert's statement, but offer that certain newspaper articles offered were published in these newspapers at a certain time.

Mr. Thompson: But we will go further, Your Honor; we will prove that the articles were furnished in typewritten form by Mr. Ewert.

The Court: You make that offer of proof too, the same ruling would be in regard to that; get your offer in shape.

150 Mr. Thompson: The plaintiff offers as evidence an article that appeared in the Miami Record Herald on June 1st, 1909; a newspaper published in Ottawa County, Oklahoma, said article being on the first page thereof and being the first column on the left hand side of said page and being headed "To Quiet Title to Indian Lands. Special Assistant Paul A. Ewert States Position of Government;" and further offers to prove that this article was written by the defendant in this case and furnished said newspaper and requested same to be published therein.

Mr. Kornegay: Well, if you can prove that we had it, well go ahead and prove it. The paper that you have there, we admit that the article appeared in.

The Court: You admit that article appeared in that paper?

Mr. Kornegay: Yes sir.

The Court: But you don't admit that it appeared at Mr. Ewert's—

Mr. Thompson: I don't know that we can do anything at all until the Editor is here.

The Court: If the Editor was here and you offered him to prove that Mr. Ewert caused that to be published, under the ruling which I have heretofore adhered to, it would have to be ruled out.

Mr. Thompson: I understand that but we want the offer to go so far as we are offering to make that proof.

Mr. Kornegay: And we object to the offer to make proof. Your Honor, as incompetent, and immaterial.

151 The Court: You will object, if the witness is produced object to his testifying in regard to it; I think the record can probably be made up then; if your witness comes here that offer can be made; in the meantime, I can hear you gentlemen on the law.

Mr. Thompson: I think we can offer that now.

And thereupon M. C. FARKENBURG being called as a witness on behalf of the complainant, sworn and under oath testified as follows:

Direct Examination

By Mr. Thompson:

Q. You may state your name. A. M. C. Farkenbury.

Q. Where do you live, Mr. Farkenbury? A. Miami.

Q. How long have you lived in Miami?

A. About fourteen years.

Q. Do you occupy any official position at the present time?

A. That of Post Master.

Q. What was your business during the year of 1909?

A. I was in the newspaper business.

Q. What paper did you own and publish if any?

A. I owned and published the Record-Herald, Miami Record-Herald.

Q. Did that paper have a daily circulation throughout Otsewa County? A. Yes sir.

Q. Could you state whether or not you had a great many of Indian subscribers?

A. Why, quite a number; not any big number.

Q. Do you know Mr. Paul A. Ewert? A. I do.

Q. Could you state whether he was one of your subscribers? A. He wasn't a regular subscriber, I don't believe; possibly he did take the paper a short while.

152 Q. I hand you a newspaper file and ask you to examine this file and state to the Court what it is [is].

A. This is of date January 1st, 1909, Miami Record-Herald.

Q. I wish you would look at the article on the front page

A. First article? The first article here is under the heading of quieting titles to Indian lands.

Q. Now, I would ask you Mr. Farkenbury, where you got the copy for that article?

A. Well, my recollection is that it was furnished by Mr. Ewert.

Q. That is in typewritten form? A. Typewritten form.

The Court: What is the date of that?

A. January 1st, 1909.

Mr. Thompson: The plaintiff now offers in evidence the article identified by the witness and asks that the stenographer marks same as its exhibit 11, and copies the same in the record.

Mr. Ewert: I think we will object to that, Your Honor, as incompetent, irrelevant and immaterial.

The Court: Well, I will have to examine it—the objection is sustained.

Mr. Thompson: Exceptions; that is all, Your Honor.

Witness dismissed.

And thereupon, S. A. ROBERTS being called as a witness on behalf of the complainant, sworn and under oath, testified as follows:

153

Direct Examination

By Mr. Thompson:

Q. What is your name? A. S. A. Roberts.

Q. Where do you live, Mr. Roberts?

A. Miami, Oklahoma.

Q. What is your business? A. Publishing a newspaper.

Q. How long have you been in that business?

A. I have been in the business in Miami since the first day of January, 1910.

Q. Did you keep a file of your newspapers, Mr. Roberts?

A. I do.

Q. What paper do you publish?

A. I publish the Ottawa County Republican and Miami Daily Republican.

Q. I hand you one of your files and ask you to examine the two papers turned down, in reference to an article "Ewert Digs Up Unlawful Leases" and state whether or not that is a part of your files and a copy of your paper that you have been publishing? A. They are.

Q. And what is the date of that paper that is folded down there? A. February 21, 1910 and February 22nd, 1910.

Q. Did this paper of yours, known as the Miami Daily publican, have a daily circulation through the County of tawa? A. Yes sir.

Q. I will now call your attention to the newspaper article appearing, commencing on the sheet of February 21, 1910 the Miami Daily Republican, and continued in the issue of February 22nd, 1910, said article being headed "Ewert I Up Unlawful Leases" and ask you to state where you got your copy for that article if you remember?

A. Can I answer that in general?

Q. Answer it the best way you can.

154 A. All I can state Your Honor with reference to the articles in question is this: that Mr. Ewert from time to time there brought in the manuscript, or called my attention to articles and stated that they were matters of general interest, and ought to be published. I was a stranger in town at the time, having come there only January 1st, and wouldn't have known otherwise, whether they were of interest to the public, this being one of others.

Q. You published a great many articles for Mr. Ewert, didn't you?

Mr. Ewert: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. I hand you another roll of files of the Republican and ask you to state what distinction is there between the Miami Daily Republican and the weekly, if any?

A. One is a daily and the other a weekly.

Q. I hand you this file and ask you to state to the Court what that is and what the day is.

A. This is a weekly paper of Ottawa County Republican dated Monday, January 17th, 1910.

Q. I call your attention to an article on the front page of this issue of the paper, headed "To Annul Leases On Five Thousand Acres", being the second column from the right hand side of the paper, and ask you to state who furnished that copy to you?

A. I can only reply in the same general way that I did before, that as far as identifying and saying on oath that Mr. Ewert furnished that identical article—you see, this is January 1917, I had only been in that town seventeen days and would have no reason to have any knowledge that such a

cles were of any interest other than the fact that Mr.
155 Ewert called my attention to them, or furnished copies, one or the other—for these as well as the others.

Mr. Thompson: The plaintiff offers in evidence the article identified as being of the issue of Miami Daily Republican on February 21, 1910, and continued into the issue of February 22nd, 1910, headed "Ewert Digs Up Unlawful Leases".

The Court: Of the same general character of the one already ruled upon?

Mr. Ewert: Objected to as incompetent, irrelevant and immaterial, and also that they antedate by more than a year a time when the Bluejacket land here in question was purchased by defendant.

Mr. Kornegay: You mean afterward?

Mr. Ewert: Yes, afterward.

The Court: Objections sustained and exceptions noted.

Mr. Thompson: We also offer in evidence the article identified by witness as being of date January 17th, 1910, headed "To Annul Leases on Fifteen Thousand Acres".

The Court: That is the same character?

Mr. Ewert: The same objections.

The Court: Objections sustained and exceptions noted.

Mr. Thompson: I believe that is all.

Witness dismissed.

156 Mr. Thompson: Your Honor, we would be glad to furnish a true copy of these articles to the reporter, or leave it with the reporter, with—

Mr. Kornegay: Let the editor furnish a copy.

The Court: [Alright]; if you secure from the editor certified copies of the several articles identified, so they may be inserted in the record, we will rely upon the editor to furnish the copies.

Mr. Thompson: That is all.

And thereupon, evidence upon behalf of the defendants is offered as follows:

PAUL A. EWERT, being called as a witness, under oath testified as follows:

Direct Examination

By Mr. Kornegay:

Q. Mr. Ewert, if there is anything in connection with these matters that you desire to state, you may proceed.

The Court: I don't want to open this up where objections will be—I think you better interrogate him.

Q. You are the defendant, are you Mr. Ewert? A. I am.

Q. You filed these answers? A. I did.

Q. In the answers it is stated here that the Attorney General knew of this purchase which you made; I wish you would tell the Court what there is to that.

Mr. Thompson: I object to any statement made to the Attorney General as hearsay.

The Court: Sustained.

Mr. Kornegay: Exception.

157 Q. I wish you would state to the Court whether or not the Department of Justice formed—was informed in an official way of the fact that you had purchased this land?

A. They were.

The Court: Just a moment.

Mr. Thompson: Objected to for the reason that it is incompetent, irrelevant and immaterial, hearsay statement from the Department, and moreover his acts, if he was not qualified to purchase, no statement from the Secretary of the Interior could qualify him.

The Court: Sustained.

Mr. Kornegay: Exception.

Q. I wish you would state whether or not before the deed was approved by the Secretary of the Interior it was known to that official, that you P. A. Ewert, occupied such position that you did with reference to the Department of Justice, had become the purchaser?

Mr. Curry: Object to that as incompetent, irrelevant and immaterial.

The Court: He may answer that.

A. Yes.

The Court: Objection overruled and exceptions noted.

Witness dismissed.

Mr. Ewert: The defendant Ewert offers to prove by himself as defendant that prior to the purchase and sale of
158 the land involved in this controversy, he consulted his superior officer, the Attorney General of the United States, and the Attorney General advised him that he saw no reason why he should not bid on this land. The plaintiff further offers to prove—the defendant further offers to prove by himself as defendant that before this land was purchased and before the deed was approved by the Secretary of the Interior of the United States, he talked with both the Commissioner—the Commissioner of Indian Affairs of the United States and the Assistant Secretary of the [Treasurer] of the United States, with reference to the propriety and the legal right of himself to bid in the said land, and that of said officers saw no legal—

The Court: Well now, you are making an offer to prove there, which is not necessary in an offer to prove—I sustained the objection as to what transpired between you and the Attorney General. You were asked if the Secretary of the Interior knew you were the purchaser before proving the deed and you stated he did.

Mr. Ewert: I will take the stand again.

And thereupon PAUL A. EWERT being recalled further testified as follows:

Redirect Examination

By Mr. Kornegay:

Q. Well, go ahead.

The Court: This is over your objection and exception, as to what transpired between this defendant and the Secretary of the Interior or Commissioner of Indian Affairs, or other officer connected with this sale before the approval of
159 it.

A. I was in Washington, D. C., shortly after I made the bid on the Bluejacket land here in question; that I personally conferred with the Assistant Secretary of the Interior, Frank Pierce, who had this matter in charge, and with the Commissioner of Indian Affairs, relative to the propriety and legality of making the bid, and that in that conversation with them I stated that if it was not legal and proper, I would withdraw my bid, and thereafter—

The Court: Now, this is going into something that I think it outside the range. I permitted the answer to be made to the question with regard to whether or not the Secretary [know] that this defendant who was the officer of the Department of Justice, was the purchaser. He answered yes; I will not admit the whole range of conversation because I don't think that is competent.

A. Let me state further that both the Secretary of the Interior and the Commissioner of Indian Affairs knew of my appointment of Special Assistant to the Attorney General, and of the capacity and manner of my employment in the Quapaw Agency in which the land was situated.

Mr. Curry: We wish to strike out the statement of the witness with reference to what the Secretary of the Interior and his Assistant knew, for the reason that the same is incompetent, irrelevant and immaterial; and for the further reason that it is mere hearsay; and that the office of the Secretary of the Interior of the United States can speak only by his
160 written record as to matters affecting the rights of third parties; and any statement by the Secretary of the Interior made to the defendant would be extra official and not competent evidence to affect the rights of the plaintiff in this case in any way.

The Court: The motion addressed to the last statement made by the—narrative statement made by the witness, will be sustained; the statement will be stricken.

Mr. Curry: I made the same motion as to the first part of the statement and for the same reason.

The Court: Now, the motion is addressed to the entire statement, beginning where the stenographer began to read, from thereon; the motion will be sustained and exceptions noted; stricken from the record and exceptions noted.

Mr. Curry: Now, we object to the offer, although it has been excluded, I want the reason to go in there: we object to the offer of the witness, the defendant in this case, to [tate] what the Attorney General said to him, for the reason that the Attorney General of the United States is not authorized to speak as to any matter of law or fact, except to advise the head of a deparament upon a written request, and is then not authorized to make any statement unless it relates to some law or act, which would effect the rights of the Secretary himself, or impose some penalty upon the Secretary for acting contrary to a proper construction.

The Court: You just desire to have the record show your reason for objecting then. The Court has excluded it.

Mr. Curry: Yes sir.

161 The Court: Any further proof?

Mr. Ewert: Plaintiff offers to prove that at the said conversation between himself and Franklyn Pierce, the Assistant Secretary of the United States, and the Commissioner of Indian Affairs, that the Commissioner and the Secretary said to him that they knew of his employment as Special Assistant to the Attorney General of the United States, and the capacity in which he was serving in the Quapaw Agency, and that they saw no legal objections to him purchasing the said lands at public sale to the highest bidder, under the rules and regulations of the Secretary of the Interior of the United States, and that the deed would be approved—

Mr. Curry: We object to the offer for the same reason heretofore assigned.

The Court: The offer is made, I presume, pursuant to objections sustained by the Court heretofore to other matters?

Mr. Ewert: Yes sir.

The Court: [Alright.] The same objection may be noted as to the offer in the record.

And thereupon, IRA C. BEAVER, being called as a witness on behalf of the defendant, sworn and under oath testified as follows:

Direct Examination

By Mr. Ewert:

Q. State your name Mr. Beaver. A. Ira C. Beaver.

162 Q. What position do you now occupy with the Federal Government if any?

A. United States Indian Superintendent, Quapaw Indian Agency.

Q. How long have you held that position?

A. Since January 6th, 1908.

Q. Did your office, through yourself, conduct the matter of the sale of the Bluejacket land involved in this controversy to the defendant Ewert? A. I did.

Q. State to the Court when this land was first offered for sale under a petition by the heirs, plaintiffs in this case, if such petition was made.

Mr. Curry: We object to that for the reason that the offer for sale would have been in writing and the writing would be the best evidence.

The Court: When the offer was made?

Mr. Ewert: Yes sir.

The Court: He may answer.

Q. I had so many of those transactions that it would be impossible—physically impossible for a man to retain it all in his mind.

The Court: Have you a record in regard to that?

A. Yes sir, I have.

Q. Refreshing your memory from the record, please state the date when the petition was filed?

A. Page 49 of the book of record of sales kept at the Quapaw Agency which is a part of the record of the Quapaw Agency, sale number—

The Court: You asked when that first offer was made.

A. This record shows that the petition was made June 20th, 1908. It was received in my office the same day and it was listed for sale on the same day; bids to be opened August 1908.

163 Q. Pursuant to that petition were the lands offered for sale? A. Yes sir; offered for sale.

Q. Prior to being offered—

Mr. Curry: Do you have a record which shows whether it was offered for sale or not?

A. Yes sir, I have a record here of the bids made on it.

Q. The date of the first offer of sale was what? You have stated it. A. Offered for sale?

Q. Yes. A. August 17th, 1908.

Mr. Curry: We object and move that the evidence with relation to this sale be stricken out for the reason that it was not the offer pursuant to which the sale was made.

The Court: Overruled.

Q. State to the Court whether or not pursuant to that petition and the rules and regulations promulgated by the Secretary of the Interior of the United States you caused the land to be appraised after the manner required by the rules and regulations of the Secretary of the Interior?

A. I did.

Mr. Curry: Object to that as a conclusion of the witness.

The Court: That would be a conclusion whether he caused it to be appraised in accordance with the rules. Answer whether you caused it to be appraised or not.

A. Yes sir, I did.

Q. Was that appraisement a secret appraisement?

A. Yes sir.

Q. Was the Appraisement ever made public to any person prior to the time that the deed was executed and delivered and approved, except the Department of the Interior and officials of your office?

164

A. No sir, never was.

Mr. Curry: I object because it is leading.

The Court: What is the—I don't see the purpose of this. What has been proven in this case that you desire to meet with this proof?

Mr. Ewert: This, Your Honor—I think you will agree with me that here is [—] case that has got to go into the record and charges a most flagrant violation of my duties, and I wish to show that months before I was appointed to this position, that this land was offered for sale—

The Court: Presumably this sale was made in accordance with the rules and regulations; if it was, there was no publicity made.

Mr. Curry: We object to the testimony for the reason that if it was advertised in perfect compliance of law it would not qualify Mr. Ewert if he was otherwise disqualified from making the purchase.

The Court: No, and presumably this sale was made by the Secretary according to the rules and regulations, and until some attack is made upon the sale for that reason, it is unnecessary to encumber the record with this evidence.

Mr. Ewert: Do I understand the Court to say that any—

The Court: So far as what was done in relation to the rules I think is absolutely incompetent; I permitted you to show when the petition was filed for the sale of this land; you have that in the record, and presumably this sale
165 was made pursuant to the petition. It is so plead and so admitted in the answer.

Mr. Ewert: Yes, but if this matter comes to a court's sitting as a court of equity there, then they have only before it the things that appear of record, and I think as a matter of personal—

The Court: No, we are not going to let anything go into here as a matter of personal privilege. I am going to draw the line—

Mr. Ewert: Yes, I know, Your Honor; we desire to prove by Ira C. Beaver now on the stand, that the lands here in question were advertised pursuant to the rules and regulations of the Secretary of the Interior of the United States for seven days consecutively and that during all of that period of time up until the time of sale to P. A. Ewert, that the [higgest] bidder on said lands was a bid made by Adelbert Hughes, who caused the said lands to be advertised for sale through the heirs, and the amount of said bid was four thousand dollars; that the defendant made three bids on said land, the first bid being in February 1909; that the said bid was in the neighborhood of forty six hundred dollars; that the bid was rejected because below the appraisement; that thereafter he bid again on the said land and again the amount of his bid was below the appraised value and rejected; that he made a third bid of five thousand dollars on said land, all under the sales above stated, and that at said sale he was the highest bidder.

166 The Court: The offer may go in the record; the Court rules that the testimony offered is incompetent, irrelevant and immaterial in this case. You may have your record.

Mr. Ewert: That is all.

Mr. Kornegay: I wish to ask one question, Your Honor.
By M. Kornegay:

Q. Mr. Beaver, what is this land actually appraised at by the Interior Department? What does it show there, if it is in this record?

A. I will have to refer to another record before I can tell you.

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial; and for the further reason that the testimony offered by plaintiff as to value of the land at that time was excluded.

The Court: Objection sustained; exception noted.

Witness dismissed.

And thereupon HORACE D. DURANT being called as witness on behalf of the defendant, sworn, and testified under oath as follows:

Direct Examination

By Mr. Ewert:

Q. You may state your name Mr. Durant.

A. Horace D. Durant.

Q. Are you acquainted with one Adelbert Hughes?

A. Yes sir.

Q. Were you formerly Superintendent, or Disbursing Agent of Quapaw Agency? A. Yes sir.

167 Q. When did you leave the service?

A. January 1st, 1908.

Q. At that time state whether or not one Adelbert Hughes came to you and asked to have guardian appointed for the minor Bluejacket heirs, minor heirs of Charles Bluejacket, with a view of filing a petition with the Superintendent and Disbursing Agent, or the Secretary of the Interior of the United States, asking to have this Bluejacket land here in controversy offered for sale?

A. Yes sir. Mr. Hughes came to be sometime about the date you mentioned. I don't remember the exact date.

Q. In the month of January?

A. For that purpose that you mentioned.

Q. And pursuant to that request of Mr. Hughes, did you consult the heirs and prepare the petition for guardianship?

A. Yes sir.

Q. Did you prepare the petition for Mr. Hughes and the guardian offered here in evidence as exhibit, plaintiff's exhibit 10?

The Court: What is the question about those now, Mr. Ewert?

Mr. Ewert: Well, I wish to show that I was in no manner connected with the transaction of causing this land to be offered for sale.

The Court: There is nothing in the record that indicates that you were, so you needn't take up the time of the Court.

Mr. Ewert: That is all, Mr. Durant.

Witness dismissed.

168 The Court: Is that the proof of the defendant?

Mr. Ewert: That is all.

The Court: Any rebuttal?

Mr. Thompson: No sir.

(Motion for a finding in favor of the Defendant.)

Mr. Kornegay: Your Honor, at this time, we would like to ask Your Honor to make a finding in favor of the defendant Ewert.

The Court: Well, I will hear the plaintiff briefly in argument, and will hear you gentlemen and decide this matter.

169 (Plaintiff's Exhibit 1.)

(Certified Copy of Patent to Charles Bluejacket, September 26, 1896.)

Office of the County Clerk
Miami, Oklahoma.

Certificate of True Copy

(Book 9, Page 504)

State of Oklahoma,
County of Ottawa—ss.

To All Whom This May Concern—Greeting:

This Is To Certify, That the within and attached is a true and correct copy of a certain instrument that is on file and of record of this office, and I do so certify.

Witness my hand and official seal as such County Clerk, of above County and State, this 14th day of March, A. D. 1917.

(Seal)

J. A. WALKER,
County Clerk.
By J. C. Briggs, Deputy.

170 The United States of America
To
Charles Bluejacket.

Patent:

(Certified Copy)

No-16.

The United States of America: To All to Whom These Presents Shall Come—Greeting:

Whereas, There has been deposited in the General Land Office of the United States an order bearing date March 30, 1896, from the Secretary of the Interior, accompanied by a schedule of allotments of land, dated November 15, 1895, from the Commissioner of Indian Affairs, approved by the Secretary of the Interior March 28, 1896, whereby it appears that under the provisions of the Act of Congress approved March 2, 1895, (28 Stats. 907) Charles Bluejacket an Indian of the Quapaw tribe, residing on the Quapaw Reservation in the Indian Territory, has been allotted the following described land, viz:

The East Half of the South-West Quarter and the South-West Quarter of the South-West Quarter of Section Thirty-Two, in Township Twenty-Nine North, and the Lot numbered One of the North-East Quarter and the Lot numbered Two of the North-East Quarter of Section Five, in Township Twenty-Eight North of Range Twenty-Four East of Indian Meridian, in Indian Territory Containing Two-Hundred acres.

Now, Know Ye, That the United States of America, in considering of the premises, and conformity with the provisions in said Act of Congress approved March 2, 1895, the Order and Schedule of allotments aforesaid, Has Given And Granted, and by these presents Does Give And Grant, unto the said Charles Blue Jacket and to his heirs, the said tract above described, but with the stipulation and limitation contained in the aforesaid act, that the land embraced in this Patent shall be inalienable for the period of Twenty-Five Years from and after the date hereof,

To Have And To Hold the same, together with all the rights, privileges, immunities and appurtenances of
171 whatsoever nature thereunto belonging, unto the said Charles Blue Jacket and to his heirs, forever;

Provided, as aforesaid that said tract shall be inalienable for the said period of Twenty-Five-years.

In Testimony Whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made Patent and the Seal of the general land Office to be hereunto affixed.

Given under my hand at the City of Washington, this twenty-sixth day of September in the year of Our Lord One Thousand Eight-Hundred and Ninety-Six, and of the Independence of the United States the One Hundred and Twenty-First.

By the President:—

GROVER CLEVELAND
By M. McKean, Secretary

(L. S.)

L. Q. C. Lamar, Recorder of the General Land Office.
Recorded Vol p.

Department of the Interior:
General Land Office:

Washington May 10-190

1909-50936- B.

I hereby certify that the annexed Copy of Patent is a true and literal exemplification from the record in this office.

In Testimony Whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

(Seal)

JOHN O'CONNELL
Acting Recorder of the General Land Office.

Filed for record 9-22-09-9-A. M. fee \$1.75.

Mailed to Paul A. Ewert, City 9-22-09.

C. G. JAMES
Reg. De

(Book 9 Page 1)

172

Pls. Ex. 2.

Address reply to
 "The Attorney General"
 and refer to
 Initials and Number.

.....

Department of Justice,
 Washington.

Miami, Oklahoma,
 January 19th, 1909.

Mr. Wesley M. Smith,
 Baxter Springs, Kansas.

Dear Sir:

I find in going over the abstracts as I continue the work looking to the clearing of the Quapaw titles, that you and other persons have quite a number of leases that, in the opinion of the Government, are not lawful leases, to-wit: agricultural leases that are given for a greater period than ten years, or leases given for the lawful period of three and ten years respectfully which, by their terms are to begin at the expiration of some other lawful lease at some date in the future.

It ought not be necessary for me to take up each allotment and write you a personal letter concerning each of these leases as I find them. I believe that I have now done my full duty to you in writing you in as many instances as I have, asking for a cancellation of what the Government claims are unlawful leases. Will you not now be kind enough to go over your entire list of holdings in the matter of agricultural and mining leases and ascertain what leases you have coming under the above class of unlawful leases, and when you have ascertained the fact, will you not include all of such leases in a general cancellation, describing each particular tract, that these encumbrances may be removed from all lands in the Quapaw Agency, as far as you are concerned.

I am writing a like letter to all other persons and companies holding that class of leases and I assure you that the Government will play no favorites in these proceedings. It is my purpose of "hew to the line and let the chips fall where they may." I would thank you very much to comply with the above request and have your cancellation sent to

the Register of Deeds at the earliest possible moment, because I would like to have them on record before Friday of this week. In my endeavor to free the records of these many encumbrances before bringing suit and to give all parties due notice of the position of the Government, I have delayed the bringing of suits to quiet titled and remove clouds from these Indian allotments, to a time when I fear that the Attorney General is becoming impatient. I hope you will see your way clear to act along the line above suggested at the earliest possible date.

Be kind enough to make a carbon copy of the release that you execute and send the same to me at the time that you send the original to the Register of Deeds. I enclose a form which you may use if you desire. Of course, if you have many leases you will have to use this form but run off your cancellation on the machine.

Yours truly,

(Signed) PAUL A. EWERT,
Special Assistant to the Attorney General

Enc.
MWP

174

Pls. Ex. 3.

Address reply to
"The Attorney General"
And refer to
Initials and Number.

.....
.....

Department of Justice,
Washington.

Miami, Oklahoma,
January 7th, 1909.

Mr. W. T. Apple, Trustee,
Quapaw, Oklahoma.

Dear Sir:

The records show that under date of June 13th, 1905, Kah-dah-ska-hunka and Kah-deeh, his wife, executed to you certain mining lease of the lands mentioned in the allotment of Mary Grandeagle. In view of the fact that there is upon this land a prior lease, this lease unexplained, appears to me to be null and void.

I am about to begin an action to quiet the title to set aside all unlawful leases to this land and unless some explanation can be offered, I will thank you to execute a release to the above instrument at an early date. Suit will be brought within the next ten days.

Yours truly,

(Signed) PAUL A. EWERT,
Special Assistant to the Attorney General.

MWP

175

Pls. Ex. 4.

Address reply to
"The Attorney General"
And Refer To
Initials and Number.

.....
.....

Department of Justice,
Washington.

Miami, Oklahoma.
January 7th, 1909.

Mr. Walt Apple,
Quapaw, Oklahoma.

Dear Sir:—

Under date of January 9th, 1907, you took from Kah-dah-ska-hunka and Kah-daah a certain mining lease to the N. E. 1/4 and the S. E. 1/4 of Section 4, Township 28, Range 23, to begin July 1st, 1915, and to expire July 1st, 1925.

The Department holds that all leases of this kind are void and if you concur in that opinion, be kind enough to execute a release to this instrument at an early date. Suit will be brought to quiet the title and to cancel all illegal leases on this allotment within the next ten days and it is suggested that you take the action above asked for at an early date.

Yours truly,

(Signed) PAUL A. EWERT,
Special Assistant to the Attorney General.

MWP

176

Pls. Ex. 5.

Address reply to
"The Attorney General"
And Refer To
Initials and Number.

.....
.....

Department of Justice,
Washington.

Miami, Oklahoma.
March 20th, 1909.

Mr. Wesley M. Smith,
Joplin, Missouri,

Dear Sir:

Permit me to call your attention to a transaction whereby one Walter Apple, with whom you are well acquainted, assigned to you a certain land lease which he had taken from Grace Sacto. The assignment of this land lease was dated January 14th, 1909, and placed of record January 15th, 1909. By this assignment he transferred to you his interest in a certain land lease which he secured from Grace Sacto Cooper dated November 21, 1908, recorded November 23rd, 1908, whereby the said Grace Sacto Cooper leased to him certain lands from March 1st, 1911, to March 1st, 1926.

You undoubtedly know that the law in force in the Quapaw Agency does not permit of the lease of agricultural land for a greater period than three years. Apple knew this and being afraid to stand fire himself has sought to make you the target by assigning this mercilessly unlawful and, I am told, fraudulent lease to you.

I wish you would be kind enough to write me by return
177 mail without fail whether you knew of this assignment by him to you and whether you pretend to own any interest whatever in this lease as it now stands. From my conversation with you I am sure that you do not desire to be brought into court and made a party defendant to a transaction of this nature.

I enclose you a franked envelope which requires no stamp for the favor of your early reply.

Yours truly,

(Signed) PAUL A. EWERT,
Special Assistant to the Attorney General.

Enc.
MWP

178

Pls. Ex. 6.

Address Reply to
"The Attorney General"
And Refer to
Initials and Number.

.....
.....

Department of Justice,
Washington.

Miami, Oklahoma,
June 19th, 1909.

Mr. Walter T. Apple,
Baxter Springs, Kansas.

Dear Sir:—

I have this day been informed that you have not yet canceled the fifteen year lease which you have on the allotment of Harrison Quapaw and I am writing to know whether you care to attempt to carry this lease or to cancel it.

I have not examined the records but complaints have been made to me that this lease has never been canceled by you.

Yours truly,

(Signed) PAUL A. EWERT,
Special Assistant to the Attorney General.

MWP

179

Pls Ex. 7.

Address reply to
"The Attorney General"
And Refer to
Initials and Number.

.....
.....

Department of Justice,
Washington, D. C.

Joplin, Mo., February 11, 1911.

Mr. Wesley M. Smith,
Baxter Springs, Kansas.

Dear Sir:—

Some time ago I sent a cancellation of an unlawful agricultural lease which you hold on a tract of land in Ottawa County, to J. J. Bulger for your signature.

The lease in question is a twenty year lease, assigned to you by Walter T. Apple or Bulger, and of course, under all the decisions is clearly void. Will you be kind enough to step into Bulger's office and execute the cancellation and send me a draft for \$1.25 for the purpose of placing it of record? Unless this is done it will be necessary, of course, to bring suit to have it cancelled of record.

Yours truly,

(Signed) PAUL A. EWERT
Special Ass't to the Attorney General.

PAE-H

180

Pls. Ex. 8.

Address Reply to
"The Attorney General"
and Refer to
Initials and Number.
.....
.....

Department of Justice,
Washington, D. C.

Joplin, Mo., March 13, 1911.

Mr. Wesley M. Smith,
Baxter Springs, Kan.

Sir:

I enclose cancellation of a twenty-year agricultural lease taken by Walter Apple upon certain premises now owned by mw. This lease by the courts and I think, by the judgments of all attorneys, is clearly illegal, and you are requested to execute this cancellation and return it to me, together with \$1.25, the fee for placing the same of record.

I originally sent this through Judge Bulger and he has returned it to me. He executed a cancellation of a lease which he had covering the adjoining lands. Be kind enough to let me hear from you by return mail, and greatly oblige

Yours truly,

(Signed) PAUL A. EWERT

PAE-H

181

Pls. Ex. 9.

Address Reply to
"The Attorney General"
and Refer to
Initials and Number.

.....
.....

Department of Justice,
Washington.

Miami, Oklahoma,
January 15th, 1909.

Mr. Wesley M. Smith,
Care of Walter Apple,
Baxter Springs, Kansas.

Dear Sir:—

I am in receipt of your letter of January 14th. Will you be kind enough to send me either the original instruments which you have, under date of your letter, sent to the Register of Deeds to be recorded, or send me the copies thereof, showing the instrument, the date of the assignment and the date of recording, and the book and page with the Register of Deeds.

I note your statement about having taken the advice of eminent counsel in the matter of securing a lease to begin July 1st, 1915, and to continue for a period of ten years. In view of the advice of your counsel, I take it that you wish to stand suit upon this lease.

Yours truly,

(Signed) PAUL A. EWERT
Special Assistant to the Attorney General.

MWP

(Probate proceedings in the matter of the Estate of William Bluejacket, et al., Minors, in the County Court of Ottawa County, Oklahoma.)

State of Oklahoma,
Ottawa County,
In County Court.

(Petition of Carrie Bluejacket, as guardian of the estate of William Bluejacket, et al., to sell real estate.)

In the Matter of the Estate of William, Blanche, Amy and Clyde Bluejacket, minors.

Comes now Carrie Bluejacket as guardian of the estate of William, Blanche, Amy and Clyde Bluejacket, minors, and shows to the Court:

That the amount and value of personal property that has come into her hands as assets of said estate is \$.;

That said wards are the owners in fee simple, subject to the widows' dower, of the following described real estate, the said William Bluejacket being the owner of the undivided one ninth interest in said estate; the said Blanche Bluejacket being the owner of an undivided one-ninth interest in said estate; the said Amy Bluejacket being the owner of an undivided one-ninth in said estate and the said Clyde Bluejacket being the owner of an undivided one-ninth interest in said estate; situate in the County of Ottawa, State of Oklahoma, described as follows, to-wit:

The E/2 of the SW/4 and the SW/4 of the SW/4 Sec. 32 T 29 N., and Lots 1 and 2 in the NE/4 of Sec. 5 T 28 N., and the NW/4 of the NE/4 of Sec. 28 T 29 N., all in range 24 East of the Indian Meridian containing 240 acres, more or less;

That said 240 acres was the allotment to one Charles Bluejacket as a member of the Quapaw tribe of Indians of the Quapaw Agency, Ottawa County, Oklahoma, that said Charles Bluejacket died on the 3rd of May, 1907, leaving as his sole heirs at law the following named persons, to-wit:

Carrie Bluejacket, his widow; Cora Lafalier and Louis
183 Pascal, children of Flora Pascal Lafalier, nee Bluejacket, deceased, a daughter; Rose Bluejacket Daugherty, a daughter; Ida Bluejacket Holden, a daughter, Edward Bluejacket, Walter Bluejacket and William Bluejacket, sons, Blanche and Amy Bluejacket daughters and Clyde Bluejacket, a son;

That under the laws of the United States applicable [fo] the sale of Indian land such lands must be sold under the rules and regulations of the Secretary of the Interior;

That all of the heirs are desirous of disposing of their interests in said real estate;

That the sale of said real estate is necessary for the maintenance and education of said wards;

That there is no indebtedness of said wards;

That there are liens upon said real estate to the knowledge of the petitioner;

That written consent to making the order of sale is subscribed by all persons interested therein and the next of kin;

Wherefore your petitioner prays that an order of said Court be made authorizing her to sell the interests of her wards in the whole of the real estate described in this petition by joining with the other heirs in a sale to be made with the approval of the Secretary of the Interior and this Court.

(Signed) CARRIE X BLUEJACKET
her
mark

Witness:—

Ida M. Holden

State of Oklahoma,
Ottawa County.

184 Carrie Bluejacket, the petitioner above named being duly sworn says that she has had the foregoing petition read to her and knows the contents thereof and that the same is true to the best of her knowledge and belief.

(Signed) CARRIE X BLUEJACKET
her
mark

Subscribed and sworn to before me this 1 day of July 1908.

(Seal) (Signed) HORACE B. DURANT
Notary Public.

- 185 (Petition of L. A. Lafalier as guardian of the estate of Cora Lafalier, et al., Minors to sell real estate.)

State of Oklahoma,
Ottawa County,
In County Court.

In the matter of the Estate of Cora Lagalier and Louis Pascal.

Comes Now L. A. Lafalier as guardian of the estate of Cora Lafalier and Louis Pascal, minors, and shows to the Court:

That the amount and value of personal property that has come into hands as assets of said estate is \$.; That said wards are the owners in fee simple, subject to the widow's dower, of the following described real estate, the said Cora Lafalier being the owner of the undivided 1/18 interest in said estate, the said Louis Pascal being the owner of the undivided 1/18 interest in said estate, the said being the owner of the undivided interest in said estate; and the said being the owner of the undivided interest in said estate; situate in the County of Ottawa, State of Oklahoma, described as follows, to-wit:—

The E/2 of the SW/4 and the SW/4 of the SW/4 Sec. 32 Twp. 29 N., Range 24 East; and Lots numbered 1 and 2 in the NE/4 of Sec. 5, Twp. 28 N., R 24 E., and the NW/4 of NE/4 of Sec. 28 T 29 N., R 24 E., of Indian Meridian, containing 240 acres, more or less;

That said 240 acres was the allotment to one Charles Bluejacket as a member of the Quapaw tribe of Indians, of the Quapaw Agency, Ottawa County, Oklahoma, that said
186 Charles Bluejacket died on the 3rd day of May, 1907, leaving as his sole heirs at law the following named persons, to-wit:— Carrie Bluejacket, his widow; Cora Lafalier, and Louis Pascal, children of Flora Pascal-Lafalier nee Bluejacket, deceased, a daughter; Rose Bluejacket-Dougherty, daughter; Ida Bluejacket-Holden, daughter; Edward Bluejacket; Walter Bluejacket; William Bluejacket, Blanche Bluejacket, Amy Bluejacket, and Clyde Bluejacket;

That under the laws of the United States applicable to the sale of Indian land such lands must be sold under the rules and Regulations of the Secretary of the Interior,

That all of the heirs are desirous of disposing of their interests in said real estate;

That the sale of said real estate is necessary for the maintenance and education of said wards;

That there is no indebtedness of said wards; .

That there are no liens upon said real estate to the knowledge of the petitioner;

That written consent to making the order of sale is subscribed by all persons interested therein and the next of kin;

Wherefore, Your petitioner prays that an order of said Court be made authorizing him to sell the interests of his wards in the whole of the real estate described in this petition by joining with the other heirs in a sale to be made with the approval of the Secretary of the Interior and this Court.

(Signed) L. A. LAFALIER.

187 State of Oklahoma,
Ottawa County.

L. A. Lafalier, the petitioner above named, being duly sworn, says that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except the matters therein stated on his information and belief and as to those matters he believes it to be true.

(Signed) L. A. LAFALIER.

Subscribed and sworn to before me this 29 day of June, 1908.

(Signed) D. W. TALBOT,
County Judge.

Endorsed: Filed July 17, 1908. D. W. Talbot, County Judge.

188 (Waiver of Notice of Hearing of Petition to Sell Real Estate by William Bluejacket, et al., Minors, etc.)

State of Oklahoma,
Ottawa County—ss.

In County Court.

In the Matter of the Guardianship of William, Blanche, Amy and Clyde Bluejacket, and Cora Lafalier and Louia Pascal, minors,

We, the undersigned, next of kin and parties interested in the estate of the above named wards hereby waive notice

of hearing petition to sell the following described real estate of said wards, to-wit: E/2 of SW/4 and SW/4 of SW/4 Sec. 32 and NW/4 of NE/4 Sec. 28, all in T. 29 and Lots 1 and 2 in Sec. 5, T. 28, all in Range 24, E. Indian Meridian, containing 240 a. and consent that said order of sale be made as prayed for.

Witness our hands, this 2nd day of July, 1908.

(Signed) IDA M. HOLDEN,
 " WALTER BLUEJACKET,
 " CORA B. DOUGHERTY,
 " ED BLUEJACKET.

Witness:

Horace B. Durant (Signed)

(Signed) CARRIE BLUEJACKET her
X
mark
 for herself and as guardian
 for minor children.

(Signed) Ida M. Holden.

Endorsed: In the Matter of the Guardianship of William Bluejacket, et al., Minors. Order for Hearing Petition to Sell Real Estate by Guardian. Filed July 17, 1908. D. W. Talbot, County Judge.

189 (Order for Sale of Real Estate, by L. A. Lafalier, Guardian of the Estate of Cora Lafalier, et al., Minors, etc.)

State of Oklahoma,
 Ottawa County.

In County Court.

In the matter of the estates of Cora Lafalier and Louis Pascal, Minors.

L. A. Lafalier as guardian of the estate of Cora Lafalier and Louis Pascal minors, having on the 29th day of June, 1908, presented to this Court and filed herein his verified petition in due form, praying for an order authorizing him to sell the whole or so much and such parts of the real estate described in said petition as the Court shall judge necessary and beneficial.

And it appearing to the Court that written consent to making the order of sale is subscribed by all persons interested therein and the next of kin, and that said interested

parties and next of kin waive notice of hearing petition to sell and consent that said order of sale be made; and the matter of said petition coming on regularly to be heard, the Court, upon due examination and consideration of said petition, and after a full hearing upon the same, and due consideration of the proofs and allegations finds, that a sale of real estate belonging to said estate mentioned in said petition and hereinafter particularly described is necessary for the best interest of all concerned;

It is therefore, Ordered, Adjudged and Decreed by the Court, that the said Lafalier as guardian of the estate of Cora Lafalier and Louis Pascal be and he is hereby authorized and directed to sell in one parcel or in separate parcels or legal subdivisions, as the said guardian shall judge most beneficial to said estate, under such rules and regulations as the Secretary of the Interior may prescribe, as authorized by the Act of Congress approved May 27, 1902, governing the sale of inherited Indian lands, the following described real estate, to-wit:

The E/2 of the SW/4 and SW/4 of SW/4 Sec. 32 and NW/4 of NE/4 Sec. 28 all in T. 29 and Lots 1 and 2 in Sec. 5 T. 28, all in range 24 East of Indian Meridian, Oklahoma, containing 240 acres, more or less.

It is further ordered that before making such sale the said L. A. Lafalier, guardian, execute an additional bond to the State of Oklahoma, in the penal sum of dollars, with two or more sufficient sureties, to be approved by the Judge of this Court, conditioned as required by law.

And it is further ordered that said Guardian after making said [said] in accordance with the rules of the Secretary of the Interior, make return of such proceedings and account of sales verified by [his] affidavit, to this Court, at or before its next term thereafter.

Witness my hand and the seal of said Court this 17 day of July, 1908.

(Seal)

(Signed) D. W. TALBOT,
County Judge.

Endorsed: Filed July 17, 1908. D. W. Talbot, County Judge.

Entered on Probate Record Book 1 Pages 112 & 13 on this 30 day of Nov. 1908.

J. A. WALKER,
Clerk Co. Court.

- 191 (Order for Sale of Real Estate by Carrie Bluejacket
Guardian of the Estate of William Bluejacket
et al., Minors, etc.)

State of Oklahoma,
Ottawa County—

In County Court.

In the matter of the estates of William, Blanche, Amy and
Clyde Bluejacket, Minors.

Carrie Bluejacket as guardian of the estate of William, Blanche, Amy and Clyde Bluejacket minors, having on
.... day of 1908, presented to this Court
filed herein his verified petition in due form, praying
an order authorizing her to sell the whole or so much
such parts of the real estate described in said petition
the Court shall judge necessary and beneficial,

And it appearing to the Court that written consent to making
ing the order of sale is subscribed by all persons interested
therein and the next of kin, and that said interested parties
and next of kin waive notice of hearing petition to sell
consent that said order of sale be made; and the matter
said petition coming on regularly to be heard, the Court
upon due examination and consideration of said petition,
after a full hearing upon the same, and due consideration
the proofs and allegations finds, that a sale of real estate
belonging to said estate mentioned in said petition and hereinafter
inafter particularly described is necessary for the best interest
terest of all concerned;

It is therefore, Ordered, Adjudged and Decreed by the
Court, that the said Carrie Bluejacket as guardian of the
estate of William, Blanche, Amy and Clyde Bluejacket
and ..he is hereby authorized and directed to sell in whole
parcel or in separate parcels or legal subdivisions, as
said guardian shall judge most beneficial to said
192 estate, under such rules and regulations as the Secretary
of the Interior may prescribe, as authorized by the
Act of Congress approved May 27, 1902, governing the
of inherited Indian lands, the following described real estate
to-wit:

The E/2 of the SW/4 and SW/4 of SW/4 Sec. 32
NW/4 of NE/4 Sec. 28 all in T. 29 and Lots 1 and 2 in
5 T. 28, all in range 24 East of Indian Meridian, Oklahoma
containing 240 acres, more or less.

It is further ordered that before making such sale the said Carrie Bluejacket, guardian, execute an additional bond to the State of Oklahoma, in the penal sum of dollars, with two or more sufficient sureties, to be approved by the Judge of this Court, conditioned as required by law.

And it is further ordered that said Guardian after making said [said] in accordance with the rules of the Secretary of the Interior, make return of such proceedings and account of sales verified by affidavit, to this Court, at or before its next term thereafter.

Witness my hand and the seal of said Court this 17 day of July, 1908.

(Seal)

(Signed) D. W. TALBOT,
County Judge.

Endorsed: Filed July 17, 1908. D. W. Talbot, County Judge.

193 (Petition of Carrie Bluejacket, et al., for Sale of Inherited Indian Lands.)

(Under Act of Congress approved May 27, 1902)

The Superintendent in charge

Quapaw Agency, Wyandotte, Oklahoma.

Sir:

We, the undersigned, represent that we are the sole heirs of Charles Bluejacket, deceased, an allottee No. 16, of the Quapaw tribe of Indians, Quapaw Agency, Oklahoma, who died on or about the 3rd day of May, 1907, at the age of 69 years, married and with issue, leaving as his sole heirs at law the following named persons:

Carrie Bluejacket, his widow
Rose B. Dougherty, a daughter
Ida B. Holden, a daughter
Walter Bluejacket, a son
Edward Bluejacket, a son
William Bluejacket, a son
Blanche Bluejacket, a daughter
Amy Bluejacket, a daughter
Clyde Bluejacket, a son

and Cora Lafalier and Louis Pascal, children of Flora Pascal-Lafalier, deceased, a daughter of said Charles Bluejacket.

That the deceased had no other children than the ones mentioned.

That as such heirs we request the sale of the following described lands, to-wit:

The E/2 of the SW/4 and the SW/4 of the SW/4 of Section 32, Twp. 29 N., and Lots 1 and 2 of the NE/4 of Section 5 Twp. 28 N. and the NW/4 of the NE/4 of Sec. 28 Twp. 28 N., all of Range 24 East of the Indian Meridian, containing 240 acres.

And we hereby agree to be governed by the rules and regulations of the Secretary of the Interior and the amendments thereto governing the sale of such land, and the control for our use of the proceeds to be derived from such sale.

We further represent that the allottee did not reside upon his allotment or homestead nor cultivate the land during his lifetime nor immediately preceding his death.

The land herein offered for sale is subject to the following leases:

Mining leases for ten years and farming leases for three years as shown by the records of the Register of Deeds for Ottawa County, Oklahoma.

(Signed) her
CARRIE X BLUEJACKET
mark Widow

(Signed)
Horace B. Durant
Ida M. Holden

(Signed) L. A. LAFALIER
Legal guardian of Cora Lafalier and
Louis Pascal, minors.

Witness to signature by mark

(Signed)
Horace B. Durant
Ida M. Holden

(Signed) her
CARRIE X BLUEJACKET
mark

legal guardian of William, Blanche,
Amy and Clyde Bluejacket, minors

(Signed) IDA M. HOLDEN
(Signed) WALTER BLUEJACKET
(Signed) CORA B. DOUGHERTY
(Signed) ED BLUEJACKET

(Endorsed) Filed July 17 1908, D. W. Talbot County Judge.

195 (Report of sale of certain real estate by Carrie Blue-jacket, guardian of the Estate of William Blue-jacket, et al., Minors.)

State of Oklahoma
County of Ottawa—ss.

In County Court

In the Matter of the Estates of William, Blanche, Any and Clyde Bluejacket, Minors.

Now comes Carrie Bluejacket, as Guardian of the estates of William, Blanche, Any and Clyde Bluejacket, Minors, and shows to the Court that:

Whereas, under the date of the 17th day of July, 1908, D. W. Talbot, County Judge, made and entered an order in the above entitled matter wherein it was by the said Court ordered, adjudged and decreed that the said Carrie Bluejacket, as guardian of the estates of William, Blanche, Any and Clyde Bluejacket, be authorized and directed to sell in one parcel or in separate parcels or legal subdivisions, under such rules and regulations as the Secretary of the Interior of the United States may prescribe, as authorized by the Act of Congress approved May 27th, 1902, governing the sale of inherited Indian lands, for the benefit of the said minors, all the right, title and interest of the said minors in and to the following described real estate, to-wit:

The East One Half (E-1/2) of the South-West One-Fourth (S. W. 1/4) of Section Thirty-two (32); the South-West One-Fourth (S. W. 1/4) of the South-West One-Fourth (S. W. 1/4) of Section Thirty-two (32), In Township Twenty-nine (29) Range Twenty-four (24), and Lots numbered One (1) and Two (2) of the North-East One-Fourth (N. E. 1/4) of Section Five (5), in Township Twenty-eight (28) North of Range Twenty-four (24) East of the Indian Meridian, Oklahoma, containing two hundred acres, more or less,

making returns of the said proceedings and account of sale verified by affidavit to this Court.

Now, Therefore, the said Carrie Bluejacket does, in
196 pursuance of the said order of the said Court, report that all the right, title and interest of the said heirs in and to the hereinbefore mentioned lands, pursuant to and

in accordance with the law in such cases made and provided, and in accordance with the rules and regulations prescribed by the Secretary of the Interior of the United States, were sold to the highest and best bidder for cash on the 29th day of March, 1909, to Paul A. Ewert, he being the highest bidder for cash, for the total sum for the whole tract of Five Thousand Dollars (\$5000) of which amount the said William, Blanche, Any and Clyde Bluejacket were, under the laws of descent and distribution in force and governing the distribution of said estate, each entitled to a sum equal to one-ninth (1/9) of the said Sum of Five Thousand Dollars (\$5000) to-wit: \$555.55.

Whereas, the said deed made by all of the [heris] of the said Charles Bluejacket, joined in by the said Carrie Bluejacket, as guardian of the said minors, was in due form approved by the Secretary of the Interior of the United States on the 26th day of July, 1909, and a lawful division of the moneys arising out of and by virtue of the said sale having been made by Ira C. Deaver, Superintendent and Special Disbursing Agent of the Quapaw Agency, and the distributive share of each of the said minors being in the amount of \$555.55 has come into the hands of the said Ira C. Deaver, as provided by law, and as further provided by law and the rules and regulations promulgated by the Secretary of the Interior, has by him been placed to the credit of each of the said minor heirs in the Cherokee National Bank of Vinita, Oklahoma, subject to the check of myself as the lawful guardian of the said minors when approved by the said
 197 Indian Agent in charge of approval of the said agent only when specifically authorized by the Commissioner of Indian Affairs."

And the said Carrie Bluejacket further reports that no other sum of money had come into her hands by reason of the said sale except as hereinbefore reported.

Witness my hand and seal this 11th day of November, A. D. 1909.

(Signed)

her
 CARRIE X BLUEJACKET
 mark

Her thumb mark (Imprint
 of thumb)

(Seal)

As Guardian of
 William Bluejacket,
 Blanche Bluejacket,
 Any Bluejacket,
 Clyde Bluejacket.

Witness to mark
of Carrie Bluejacket:

(Signed) B. N. Walker
Wm. D. Hodgkiss

Subscribed and sworn to before me, a notary public in and
for the County of Ottawa and State of Oklahoma, this
11th day of November, A. D. 1909.

(Seal) (Signed) IRA C. DEAVER
Notary Public, Ottawa County,
Oklahoma.

My commission expires April 19, 1913.

(Endorsed) No. 358 Wm. Bluejacket, et al.

198 (Certificate of Judge Campbell as to the Statement of
Evidence, etc.)

This is to certify that I, as Judge of the District Court of the United States for the Eastern District of Oklahoma, tried the case of Carrie Bluejacket vs. Paul A. Ewert; that the evidence was taken at Vinita in said District on the 15th day of March, 1917; that after the evidence was taken, and while I had the case under consideration, the plaintiff made application to amend his petition and filed a motion in said cause praying the court to set aside the order of submission in said cause and permit the plaintiff to file an amended petition and introduce evidence in support thereof; that there was presented to the court with said motion the amended petition which plaintiff was offering to file, and at the same time, and in support of the said motion, plaintiff exhibited to the court photographic certified copies of matters referred to in his motion and his offered amended petition with other exemplified copies of like character; that the court considered the same, and I have examined such certified copies and have identified such as I examined by marking them Exhibits, etc., thus: Exhibits 1 R. E. C. to Exhibit p R. E. C. both inclusive.

And I further certify that at the request of the appellant I have examined the transcript of the evidence taken in said cause and certified the same to be true and correct, except two newspaper articles, original exhibits 12 and 13 to be supplied

Witness my signature this 13th day of November, 1918.

RALPH E. CAMPBELL

- 199 (Remonstrance of Paul A. Ewert, Appellee to the settling of the Transcript of record.)

Comes now the appellee in the above entitled action and opposes the settlement of the record in said case under the notice, for the following reasons, to-wit:

First. That the Appellee has never been served with a copy of the proposed transcript and has never had an opportunity to examine the original of said transcript, and said original transcript of said record is not now nor has the same been filed in the office of the Clerk of the United States District Court in and for the Eastern District of Oklahoma for the examination of said appellee, all as is more fully shown by the affidavits hereunto attached and made a part hereof.

Second. That the said purported transcript, as appellee is informed and believes, has not been prepared in accordance with Equity Rule Number 75, Paragraph "B", the evidence being set forth in full, and should therefore not be allowed, U. S. vs. Motion Picture Patent Co., 230 Fed., 541; Louisville & N. R. Co. vs. U. S., 238 U. S., 1; 59 L. Ed., 1177; 35 Sup. Ct. Rept. 698; 222 Fed., 885.

Third. That the said purported transcript, according to information given appellee by the letter of appellants' counsel, shows that it is not a true and correct record in accordance with the praecipies filed, in that certain of the exhibits called for in the praecipec of both the appellant and the appellee have been omitted, and that there has been inserted certain photographic copies of certain certified copies of letters that were never adduced in the evidence and never used upon the trial, the nature and contents of which this appellee does not know, because he has never had an opportunity to examine said transcript or the purported photographic copies of said certified copies of letters, all as more fully appears by the affidavits hereunto attached and hereby made a part hereof.

Fourth. That the notice of the presenting of this transcript for settlement to this Court in order to enable the appellee to be present in person or by counsel, is not sufficient to enable appellee to be present and prepared to present his objections to this Court, all as is more fully shown by the affidavits hereunto attached and hereby made a part hereof.

Fifth. That the Honorable F. A. Youmans, Judge of the United States District Court, sitting at Fort Smith, Arkansas, has no jurisdiction, and is without lawful authority to settle

the proposed transcript outside of the Eastern District of Oklahoma, to-wit: At Fort Smith, Arkansas.

Sixth. That the appellee does not know and has no means of knowing what is in said proposed transcript because he has never had an opportunity to examine the original, nor is the same on file with the Clerk of the United States District Court for the Eastern District of Oklahoma, nor has a copy thereof been submitted to this appellee for his examination, all as more fully appears by the affidavits hereunto attached and made a part hereof.

Wherefore: Appellee respectfully asks that the said transcript be not settled at this time by said Court.

PAUL A. EWERT,
Appellee.

201 (Affidavit of Paul A. Ewert in support of remonstrance to the settling of the transcript of record.)

State of Missouri

County of Jasper—ss.

Paul A. Ewert, being first duly sworn, deposes and says that he is the appellee in the above entitled action; that he is his own and sole attorney in said action; that he has had no counsel in said action other than himself, since the month of July, 1918, when notice of the withdrawal and dismissal of the said W. H. Kornegay who appeared in the trial of said case was filed in the office of the Clerk of the United States District Court in and for the Eastern District of Oklahoma.

That on the 11th day of November, 1918, the attorney for said appellant served upon Paul A. Ewert the following notice, to-wit:

“To Paul A. Ewert:

In the matter of George Redeagle vs. Paul A. Ewert and Carrie Bluejacket et al. vs. Paul A. Ewert, now on appeal from the District Court of the United States for the Eastern District of Oklahoma, at Muskogee:

You are hereby notified that on Monday, the 18th day of November, 1918, at the hour of ten o'clock A. M. of said day, at the office of the Clerk of said United States District Court at Muskogee, aforesaid, the appellants in both said causes will submit to the Honorable F. A. Youman, a Judge of the

United States District Court, duly assigned to said Eastern District of Oklahoma, the transcript of the evidence and record in said causes of George Redeagle vs. Paul A. Ewert and Carrie Bluejacket, et al., vs. Paul A. Ewert, and ask to have the same settled and approved by said Judge.

And you are hereby requested to be present on said day and at said time and place for the purpose of making such suggestions and demands as you may be advised are proper in respect to the transcript of said evidence and such matters as you desire to have contained in said record.

A. SCOTT THOMPSON
HIRAM W. CURREY,

Attorneys for Aforesaid Appellants.

Copy of above notice received this 11th day of November, 1918.

.....
Attorneys for Appellees."

202 That thereafter, to-wit: On the 13th day of November, 1918, the attorneys for the said appellants appeared at the office of this appellee in the city of Joplin, State of Missouri, by their Law Clerk, Lea Pace, and advised this appellee that the honorable F. A. Youmand would not be in Muskogee, Oklahoma and hold a term of Court on Monday the 18th day of November, 1918, as set forth in the above notice, and would not be there until the 28th day of November, 1918, for which reason appellants would be forced to ask for an extension of time for an enlargement of the time for filing the record on appeal, and in conformity with said representations, the appellee signed the following stipulation:

"In the matter of Appeal from the Decree of the District Court of the United States for the Eastern District of Oklahoma in the case of George Redeagle vs. Paul A. Ewert and the case of Carrie Bluejacket et al. vs. Paul A. Ewert:

By reason of the fact that Judge F. A. Youmans being absent from said District and at Texarkana, Arkansas, making it very inconvenient to reach him, so as to enable the appellants to have settled and approved their respective records on appeal within the time required by law and the order of the Court enlarging the time to file records on appeal, it is hereby agreed by and between the appellants and the said Paul A. Ewert that the time for filing the said records be

and the same is hereby extended to and including the 4th day of December, 1918, and authority is hereby given for the entry of an order to such effect.

Dated at Joplin, Missouri, this 13th day of November, 1918.

(Signed)

HIRAM W. CURREY

A. SCOTT THOMPSON,

Attorneys of Record for the said George Redeagle and Carrie Bluejacket and others Appellants.

PAUL A. EWERT,

Appellee and Defendant."

That at ten o'clock on Saturday morning, November 16, 1918, appellants appeared at the law office of appellee by their law clerk, Lea Pace, and left with appellee a copy of the following notice:

"To Paul A. Ewert:

Take notice that we have just been notified this morning by Judge F. A. Youmans that he would not be able to be in Muskogee on November 18th, but would take up and dispose of the matter of settling the evidence in the case of George Redeagle vs. Paul A. Ewert and the case of Carrie Bluejacket vs. Paul A. Ewert, at his Chambers in Fort Smith, Arkansas, on Monday, November 18, 1918, and requesting counsel to appear as early in the morning as possible, in order that the matter could be taken up and enable him to leave Fort Smith,

Arkansas, to go back to Texarkana, Arkansas, on an
203 eleven o'clock train, and the appellants will present their matters referred to in said notice at said time and place.

A. SCOTT THOMPSON

HIRAM W. CURREY,

Attorneys for Appellants."

That at the time of the serving of said notice the said law clerk, Lea Pace, exhibited to this appellee a certain paper purporting to be the original proposed transcript but did not give this appellee an opportunity to examine the same, saying that she could not leave them in the office, and would not leave them in his office; that appellee requested the privilege of retaining said purported transcript for the purpose of reading it, and was refused said privilege by said clerk for said appellants and their attorneys, who immediately took

the same back to the law office of the said H. W. Currey in the city of Joplin, Missouri.

That simultaneously with said conduct, the said clerk, Lea Pace, handed to the appellee in person a letter signed by H. W. Currey, a copy of which said letter is as follows, to-wit:

November 15, 1918.

Mr. Paul A. Ewert,
Frisco Building,
Joplin, Missouri.

Dear Sir:

I just now have a letter from Judge Youmans notifying me that the matter of settling the record in the Redeagle and Bluejacket cases would have to be taken up early next Monday morning at Fort Smith instead of Muskogee, and saying that he had to leave Fort Smith at eleven o'clock to go back to Texarkana.

Now, I have a copy of the record in the two cases, but these are the original copies and I cannot let them go out of my hands. The last sheet in this record contains the certificate of Judge Campbell. If you read that you will see that the photographic certified copies are identified, and I purpose to obtain an order from Judge Youmans directing the clerk to send these to the Court of Appeals. The Clerk takes the view, and I think he is entirely correct, that these certified copies never having been offered in evidence can come before the Court of Appeals in no other way than as they come before the Trial Judge, and by this method they will come before the Court of Appeals in exactly the same way.

Now, the evidence was not reduced, but is produced just as it come from the witnesses and the Clerk has followed the praecipe of the appellants and appellee, in as much as the significance of the testimony is mainly on objections and rulings on objections and largely colloquy between court and counsel, I think the whole evidence should go up. It is prob-

ably more to your interest than ours that this be done.

204 I am sending these two copies to your office by Miss

Pace and you may examine them if you see fit. You will notice that Campbell has made a certificate of their correctness and he filed the certified copy of the Exhibits with the Clerk, having certified them by bundles. You will note that the newspaper articles offered by the plaintiff are not in the record. The stenographer had completely lost them. I will stipulate with you for copies if you want them in the rec-

ord, copies to be obtained from the original files in the newspaper office.

Yours truly,

H. W. CURREY

HWC-LP

If you find all correct you can O. K. and I will send to the Judge. H. W. C."

That this appellee advised said clerk that if it were possible for the said appellee to appear he would like to do so as a matter of [accomodation] to counsel, but that it was impossible to do so by reason of the fact that said appellee was a member of the Executive Committee of the United War Work Campaign and was actively engaged as a member of said Committee, with important public business to be attended to during the remainder of the day, Saturday, November 16, 1918, and further, that appellee had an important engagement in Kansas City, Missouri, on Monday morning November 18, 1918, the date of the hearing named in said notice, and it would be absolutely impossible for appellee to be present at said hearing on said date.

That appellee does not know what is in the said purported transcript which this Court is asked to settle and determine, and has no means of knowing; that counsel for appellant have not [following] the Equity Rules in preparing said transcript, having set forth all of the testimony and all of the exhibits in full as appellee is informed and believes, from appellant's said letter; that from said letter it appears that counsel attempted to incorporate in said record certain photographic certified copies of certain letters, the purport of which appellee does not know, never having seen them, which said letters were never introduced in evidence, were never offered to the Court or presented to the Court after any fashion, except in a certain application to re-open the case, if at all, and are not properly a part of the transcript in said case.

It further appears from the last paragraph of said letter of said appellants as above set forth, that all of the exhibits asked for by appellants and appellee in their praecipies are not included in the said transcript; that counsel for appellant states in his said letter, paragraph three, as follows: "The evidence was not reduced but is produced just as it come from the witnesses and the Clerk has followed the praecipe of the appellants and the appellee." Never having seen the said transcript or a copy thereof, or having been given the privilege of seeing the original on file with the Clerk of said

Court, because the same is not on file, appellee does not know whether said fact is true, but it appears from appellants' own letter, supra, that all of said exhibits as asked for by both parties have not been incorporated, in that certain newspaper articles are not set forth by copy or otherwise, it being agreed at the trial that said articles might be copied from said files and attached to and be made a part of the transcript.

Affiant further says that appellants had the original transcript of the record in their possession and copies thereof, for at least twenty-four if not forty-eight hours prior to Saturday morning, November 16, 1918, at ten O'clock A. M., when said notice was served, as he is informed by his Clerk and believes the same to be true, all as more fully appears by her said affidavit hereunto attached.

Wherefore: Appellee asks that the said transcript be not settled at this time by this said Court.

PAUL A. EWERT

Subscribed and sworn to before me this 16th day of November, 1918.

STELLA DeHONEY

(Seal)

Notary Public, Jasper County, Missouri.

My commission expires March 8, 1919.

206 (Affidavit of Cora Hallan in support of remonstrance to the settling of transcript of record.)

State of Missouri,

County of Jasper—ss.

Cora Hallan, Being first duly sworn, deposes on her oath and says that she is now and has been for a long time past the law clerk of the said appellee, Paul A. Ewert; that on Friday morning, November 15, 1918, Lea Pace, the law clerk of the said H. W. Currey one of the attorneys for said appellant appeared at the law office of said appellee and inquired for him, saying that she had some papers she wished to serve upon him; affiant states that she informed said Lea Pace that the said Paul A. Ewert was a member of the Executive Committee of the War Work Campaign and was on the streets engaged in the work of the Committee.

That later, the said Lea Pace again appeared at the office of appellee, the appellee in the meantime having come to his office and having been informed by this affiant of the visit of

said clerk, Lea Pace, upon the mission stated; that said Paul A. Ewert, appellee, told this affiant to advise the said H. W. Currey and his clerk, that if they had any papers to serve and would leave them, that appellee would examine them and take proper action in the premises if he should come into the office later in the day; that said Lea Pace appeared at said office a number of times during the day but refused to leave any papers and refused to advise affiant of the nature or contents of said papers.

That about ten o'clock in the morning of Saturday, November 16, 1918, the said Ewert came into his office from his work and that this affiant immediately called up by telephone the office of the said H. W. Currey and advised them that the said Ewert was in his office and would remain there for a short time and that if they had any papers to serve upon him to bring them over at once, that he was busily engaged in war work; that thereupon, the said Lea Pace appeared at the office of appellee and handed to the said Paul A. Ewert a certain letter on said date, but which letter in fact bore the date of November 15, 1918, set forth in the affidavit of the said Paul A. Ewert; that the said Lea Pace submitted to the said Paul A. Ewert a paper which she said was the original record in the case of Redeagle vs. Ewert and Bluejacket vs. Ewert, but stated that Mr. Currey, the attorney for the appellants had instructed her not to leave said papers and she would not leave them; that Mr. Ewert requested that
207 they be left with him for examination, but the said Lea Pace stated she was instructed not to leave them and could not leave them, and without giving the said Ewert the opportunity of examining the said record, she took the same with her and left the office, not serving upon the said Paul A. Ewert a copy of the record, or leaving any papers, except the notice to appear and the said letter signed by the said H. W. Currey, as set forth in the affidavit of the said Paul A. Ewert. Further affiant sayeth not.

CORA HALLAM

Subscribed and sworn to before me this 16th day of November, 1918.

STELLA DeHONEY

(Seal) Notary Public, Jasper County, Missouri.

My commission expires March 8, 1919.

* * * * *

208 (Here follows the approval of the Bill of Exception by the District Judge which is omitted at this point to avoid duplication a copy of which appears at marginal page 210 of this printed record.)

210 (Approval of Bill of Exceptions by District Judge etc.)

Now on this 18th day of November, 1918, come Carrie Bluejacket, and others, by their attorney A. Scott Thompson, and presents to me at Chambers at Fort Smith, Arkansas, who purports to be a transcript of the evidence taken at the trial in the above entitled cause, and it appearing from the certificates of the Honorable Ralph E. Campbell, former United States District Judge for the Eastern District of Oklahoma who tried said cause, that said transcript of the evidence "true and correct except two newspaper articles, original exhibits twelve and thirteen to be supplied" and relying solely on said certificate of said Honorable Ralph E. Campbell, find that said transcript of the evidence" to be true and correct except two newspaper articles, original exhibits twelve and thirteen to be supplied".

The remonstrance of the appellee is hereby attached to and made a part of this bill of exceptions. This record and transcript of the evidence in said cause and the said remonstrance of appellee are therefore, hereby approved by me and the Clerk of the District Court of the United States for the Eastern District of Oklahoma is ordered to file the same as the bill of exceptions in said cause. And upon request of appellants it is ordered that the evidence set out in the bill of exceptions be certified and transferred to the Circuit Court of Appeals without being reduced to narrative form.

Given under my hand at Ft. Smith Arkansas, this 18th day of November, 1918.

FRANK A. YOUMANS, Judge.

(Clerk's Note: [Exhibit] Twelve and Thirteen mentioned above "to be supplied" have never been supplied by either party to this suit).

211 Endorsed: Filed in the District Court on November 19, 1918.

212 (Petition for and Order Allowing Appeal.)

To the Honorable Ralph E. Campbell; District Judge:

The above named plaintiffs, feeling themselves aggrieved by the decree made and entered in this cause on the 4th day of March, A. D. 1918, does hereby appeal from said decree to the Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith, and they pray that their appeal be allowed and that citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit, sitting at St. Louis, Missouri.

213 And your petitioners further pray that the proper order touching the security to be required of them to perfect their appeal be made.

HIRAM W. CURREY,
Attorney for Appellant.

The petition granted and the appeal allowed upon giving bond conditioned as required by law in the sum of \$250.00.

RALPH E. CAMPBELL,
Judge of the District Court of the United
States for the Eastern District of Okla-
homa.

Endorsed: Filed in the District Court on August 21, 1918.

214 (Assignment of Errors.)

Now comes the plaintiffs by their attorney, Hiram W. Currey, and in connection with their petition for appeal herein, say that in the record of the proceedings and in the final decree herein manifest error has intervened to the prejudice of the appellants, to-wit:

1. The Court erred in overruling the appellants' petition and motion to set aside the order of submission of the case on the evidence (filed on the 4th day of June, 1917), and for leave to amend their said petition and complaint as presented to the Court with their said motion.

215 2. The Court erred in refusing to consider as evidence in the case the exemplification presented to the Court with the motion for leave to amend, and erred in refusing to consider the petition or bill of complaint

presented to the Court with the motion to set aside the of submission, and for leave to amend as an amended plaint in the case.

3. The Court erred in refusing the request of the plainant made at the beginning of the trial that under tion 2126, Revised Stafutes of the United States, the of proof was on the defendant, a white man, the pla being an Indian, the said cause being one within the r of the provisions of said section 2126, which places the den of proof on the white man in all suits wherein an I is a plaintiff, and a white man the defendant, and effe the property rights of the complainant and Indian.

4. The Court erred in overruling the plaintiffs' obje to the following question; asked defendant Ewert:

"Q. I wish you would state whether or not before deed was approved by the Secretary of the Interior, i known to that official, that you, P. A. Ewert, occupied position that you did with reference to the Departme Justice had become the purchaser?"

Mr. Currey: Object to that as incompetent, irrelevant immaterial.

The Court: He may answer that.

Answer: Yes.

The Court: Objection overruled and exceptions not

5. The Court erred in ruling that the relation of d ant to the Government of the United States, and the Qu Indians arising out of the fact that defendant was a s assistant Attorney General of the United States, an gaged in bringing and prosecuting suits in the 216 of the United States to recover for infractions rights, of the Quapaw Indians relating to the restricted lands, did not bring the defendant into such iary relation to said Indians as prohibited him from chasing their land and obligated him to inform the Sec of the Interior, or Commissioner of Indian Affairs facts to his knowledge which might affect the value of l land about to be sold under the supervision of the Sec of the Interior, or Commissioner of Indian Affairs.

6. The Court erred in rendering a decree for the d ant, dismissing the plaintiff's bill of complaint since admissions in the defendant's answer the Court should entered a decree for the complainant as prayed in hi

7. The Court erred in entering a decree for the defendant dismissing the plaintiff's bill of complaint, since upon the pleading and the evidence in the case, the decree should have been for the complainant against the defendant.

8. The Court erred in holding and ruling that the provisions of Section 2078 of the Revised Statutes of the United States, did not absolutely prohibit the defendant, an Assistant Attorney General of the United States, from having any concern or interest in any trade, or dealing with an Indian and in ruling that the defendant, although a Special Assistant Attorney General of the United States, had the right to purchase the land in controversy from the complainant and erred in holding and ruling that the Secretary of the Interior and the Attorney General of the United States, could give lawful permission to the defendant to purchase land of the complainant when the sale of such land was made through the office and under the direction of the Secretary of the Interior.

9. The Court erred in holding and ruling that the evidence introduced at the trial did not establish a fiduciary obligation of the defendant to the plaintiff Indian, and require the defendant to show by evidence clear and cogent that his purchase was for a fair price and in all respects equitable and just.

Wherefore the defendants pray that said decree be reversed and the District Court directed to enter a decree for the plaintiff as prayed in his bill of complaint, and that the decree herein in all things be reversed and a proper decree for the complainant herein entered.

A. SCOTT THOMPSON, and
HIRAM W. CURREY,

Attorneys for the Appellant.

Endorsed: Filed in the District Court on August 21, 1918.

218

Bond on Appeal.

Know All Men By These Presents: That we, Carrie Bluejacket, a widow, Rosie B. Daugherty, and husband, Edward Daugherty, Ida M. Holden and husband, Edward L. Holden, Walter Bluejacket, Edward Bluejacket and wife, Delfa Bluejacket, Blanche Bear, formerly Blanche Bluejacket, and Amy Bluejacket and Clyde Bluejacket, by their next friend, Carrie Bluejacket, their mother, Cora Arnett, formerly Cora LeFolier and Louis Pascal, as principals, and

George L. Coleman as sureties, are held and firmly bound unto Paul A. Ewert in the full sum of Two Hundred and Fifty Dollars (\$250.00); Conditioned that, Whereas, on the 4th day of March, A. D. 1918, in the District Court of the United States for the Eastern District of Oklahoma, in a suit depending in that court, wherein Carrie Bluejacket, a widow, Rosie B. Daugherty, and husband, Edward Daugherty, Ida M. Holden and husband, Edward L. Holden, Walter Bluejacket, Edward Bluepacket, and wife, Delfa Bluejacket, Blanche Bear, formerly Blanche Bluejacket, and Amy Bluejacket and Clyde Bluejacket, by their next friend, Carrie Bluejacket, their mother Cora Arnett, formerly Cora LaFalier and Louis Pascal, were Plaintiffs and Paul A. Ewert was defendant, numbered on the Equity Docket as 2299, a decree was rendered against the said above named plaintiffs, and the said above named plaintiffs having obtained an appeal to the Circuit Court of Appeals of the Eighth Circuit and filed a copy thereof in the office of the Clerk of the Court reversed the said decree, and a citation directed to the said Paul A. Ewert citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Eighth Circuit to be holden in the City of St. Louis in the State of Missouri on the . . . , day of December, A. D. 1918, next.

Now, [is] the said above named plaintiffs shall prosecute their appeal to effect and answer all costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

CARRIE BLUEJACKET,
ROSIE B. DAUGHERTY,
EDWARD DAUGHERTY,
IDA M. HOLDEN,
EDWARD L. HOLDEN,
WALTER BLUEJACKET,
EDWARD BLUEJACKET,
DELFA BLUEJACKET,
BLANCHE BEAR,
AMY BLUEJACKET,
CLYDE BLUEJACKET,
CLYDE BLUEJACKET,
CORA BLUEJACKET ARNETT,
CORA LaFALIER,
LOUIS PASCAL,

By Hiram W. Currey, their Attorney,
Principals

George L. Coleman,
Surety.

Approved this 21st day of August, 1918.

RALPH E. CAMPBELL, Judge.

Endorsed: Filed in the District Court on August 21, 1918.

220 (Complainants' Praecept for Transcript.)

The Clerk will please copy as the record on appeal in this case, the following papers and record:

1. The petition or bill of complaint filed by plaintiff;
2. The answer filed by the defendant.
3. Copy of Order submitting the case, made March 15, 1917;
4. Copy of order of June 4, 1917, filing motion to set aside order of submission and for leave to file amended answer.
5. Copy of motion to set aside order of submission and leave to answer, filed June 4, 1917, and copy of amended answer submitted to the Court therewith.
6. Copy of defendant's amended answer to motion to set aside submission of case and leave to answer, and copy of record entry of filing same, dated June 4, 1917.
7. Copy of defendant's amended answer in opposition to application for leave to file amended petition, and record entry of filing same, dated July 20, 1917.
8. Copy of order submitting motion to re-open case dated July 23, 1917.
- 221 9. Copy of order overruling plaintiff's motion to re-open case and file amended answer.
10. Copy of final decree in the case with exceptions thereto.
11. Copy of transcript of the evidence taken in case No. 2293, Carrie Bluejacket, et al, vs. Paul A. Ewert, being the evidence in both 2293 and 2299, and in copying the evidence or manuscript of the stenographer the Clerk will please make a complete copy, including the statements and remarks of the Court and of Counsel for the respective parties, together with the rulings of the court in every particular.
12. Copy of order allowing appeal, the petition for appeal and the assignment of errors filed therewith.
13. Copy of bond for appeal and approval thereof.

14. Copy of all exhibits shown in Stenographer's manuscript of the evidence.

A. SCOTT THOMPSON,
HIRAM W. CURREY,
Attorneys for Appellants.

222 Endorsed: Filed in the District Court on August 27, 1918.

224 (Notice of Application for leave to amend answer by interlineation.)

To the Plaintiffs in the Above Entitled Action, Above Named, and to Their Attorneys, H. W. Currey and A. Scott Thompson:

Please take notice that the defendant in the above entitled cause will be at the opening of Court on Monday, March 12, 1917, at Nine o'clock A. M. of said date, or as soon thereafter as the same may be heard by said Court, in the city of Vinita in the Eastern District of the State of Oklahoma, move the Honorable Ralph E. Campbell, Judge of said Court, for leave to amend his Answer in said above entitled action, after the manner and way set forth in the Application for leave to amend by interlineation which is hereunto attached and made a part hereof.

Dated at Joplin, Missouri, this 3rd day of March, 1917.

(Signed) PAUL A. EWERT,
Defendant, and Defendant's Attorney, 405
406 Frisco Bldg., Joplin, Missouri.

225 (Application for leave to amend answer by interlineation.)

Comes now the defendant in the above entitled action, and asks leave of the Court to amend his said Answer therein by interlineation, by adding at the close of Paragraph XII. and before the prayer for relief, the following Paragraph, to-wit:

“XIII.

As a further and separate defense herein, the defendant pleads and relies upon the statute of limitations of actions of the State of Oklahoma in bar of plaintiffs right to maintain the suit and recover, under said Section 4657 of the Revised Laws of the State of Oklahoma of 1910, and shows to the Court that the plaintiffs herein have had both actual and

constructive notice of all the facts relied upon by the plaintiffs in the Petition relative to the purchase of the said land by the said defendant, Paul A. Ewert, for more than five years previous to the commencement of this action, and for more than three years previous to the commencement of this action, and for more than two years previous to the commencement of this action, and defendant shows to the Court
 226 that these plaintiffs during all of the said five years have had actual knowledge of the fact that the said defendant did purchase the lands mentioned, in his own name, and that none of the said plaintiffs during said period of five years and of three years and of two years previous to the commencement of said action were under any legal disability; and defendant prays that this said suit upon said grounds be dismissed as against this defendant, and that he be allowed to go hence and recover his costs herein."

(Signed) PAUL A. EWERT,
 Defendant, and Defendant's Attorney,
 405-406 Frisco Bldg., Joplin, Missouri.

(Written Endorsement)

Service of the notice hereto attached and of the above proposed amendment received through U. S. mail at Webb City, Mo., this March 4th 1917.

A. SCOTT THOMPSON and
 HIRAM W. CURREY,
 Attorneys for the Plaintiffs.

(Endorsed): Due and personal service of the within Application to Amend and Notice thereof, is hereby admitted to have been made on me this day of March, 1917, by service of a copy of said Application and Notice.

.....
 Attorney for Plaintiffs.

227 Endorsed: Filed in the District Court on March 12, 1917.

(Order, March 12, 1917, granting leave to amend Answer.)

Now on this 12th day of March, 1917, it is ordered that the defendant have and he is hereby given leave to amend his answer herein.

228 (Entry in the appearance docket of the District Court,
July 20, 1917.)

“July 20, 1917, Fil & Ent. Amend Ans of Deft in opposition to application of Pltfs to set aside submission of cause.

229 (Defendant's Praecept for additional parts of the
Record.)

Comes now the defendant and shows to the Court that on the 26th day of August, 1918, plaintiff in the above entitled action served upon the defendant a copy of that certain paper filed with this Court under date of August 21, 1918, entitled “Order for Record on Appeal.” And the defendant shows to the Court that the said order for record on appeal is inequitable and unjust in that if it is allowed to stand it does not and will not properly present to the Circuit Court of Appeals of the United States the issues in said cause.

Now, therefore, the Clerk will please incorporate into the record of appeal as a part of the record, the following further and additional papers now on file in this court and of record in this court:

1. Petition for leave to amend defendant's answer by interlineation.
- 230 2. Court's order to amend.
3. Defendant's answer as amended by interlineation with filing marks thereon.
4. Entry in appearance docket of this court as made under date of July 30, 1917, showing the filing and entry of defendant's amended answer to the application of plaintiffs to set aside the order of submission and re-open cause.
5. Amended answer of defendant to application to re-open case filed July 20, 1917, together with filing marks thereon.
6. All exhibits offered and received in evidence during the course of the trial of said cause.
7. Copy of all the testimony adduced at the trial of Blue-jacket et al vs. Ewert, Equity No. 2299 and Redeagle vs. Ewert, Equity No. 2293, together with the minutes of the court showing the consolidation for trial of both of said cases.

8. Defendant's application for praecipe for additional portions of the record to be incorporated in the record, together with the proceedings had thereon in this court.

(Signed) PAUL A. EWERT.

Endorsed: Filed in the District Court on August 30, 1918.

231 (Affidavit of Cora Hallam as to Service of Defendant's Praecipe for Additional Parts of Record.)

State of Missouri,
County of Jasper—ss.

Cora Hallam, first being duly sworn, deposes on her oath and says that she is the Law Clerk of the defendant, Paul A. Ewert; that on the 31st day of August, 1918, she served the attached notice and praecipe upon the plaintiffs herein, Carrie Bluejacket, et al., by handing to and leaving with Leah Pace, the stenographer and law clerk of H. W. Currey one of the attorneys for the plaintiff, a true and correct copy of said notice and praecipe, at his office and place of business in the city of Joplin in the State of Missouri; that the said praecipe is a true and correct copy of the original thereof filed in the office of R. P. Harrison, Clerk of the United States District Court for the Eastern District of Oklahoma, at Muskogee, in said State of Oklahoma, on the 30th day of August, 1918.

Further affiant sayeth not.

(Signed) CORA HALLAM.

Subscribed and sworn to before me this 31st day of August, 1918.

(Seal)

(Signed) PAUL A. EWERT,
Notary Public, Jasper County, Missouri.

My commission expires April 18, 1918.

232 (Notice of the Filing of Defendant's Praecipe for Additional Parts of the Record.)

To Carrie Bluejacket, et al., plaintiffs in said action, and to H. W. Currey and A. Scott Thompson, their attorneys of Record:

You are hereby notified that on the 30th day of August, 1918, the defendant in the above entitled action filed with

R. P. Harrison, Clerk of the United States District Court and for the Eastern District of Oklahoma, his certain praecipe for additional portions of the record to be incorporated into the record on appeal in said case, a copy of which said praecipe so filed is hereto attached and made a part hereof. Please govern yourselves accordingly.

Dated this 31st day of August, 1918.

(Signed) PAUL A. EWERT,
Attorney for Defendant

Due and personal service of the above and attached notice and copy of praecipe is hereby admitted this 31st day of August, 1918.

.....
.....
Attorneys for Plaintiff

233 (Copy of Defendant's Praecipe for Additional Portions of the Record.)

Comes now the defendant and shows to the Court that on the 26th day of August, 1918, plaintiff in the above entitled action served upon the defendant a copy of that certain paper filed with this Court under date of August 2, 1918, entitled "Order for Record on Appeal." And the defendant shows to the Court that the said order for record on appeal is inequitable and unjust in that if it is allowed to stand it does not and will not properly present to the Circuit Court of Appeals of the United States the issues in said cause.

Now, therefore, the Clerk will please incorporate into the record of appeal as a part of the record, the following further and additional papers now on file in this court and record in this court:

1. Petition for leave to amend defendant's answer by interlineation.
- 234 2. Court's order to amend.
3. Defendant's answer as amended by interlineation with filing marks thereon.
4. Entry in appearance docket of this court as made under date of July 30, 1917 showing the filing and entry of defendant's amended answer to the application of plaintiff to set aside the order of submission and re-open cause.

5. Amended answer of defendant to application to re-open case filed July 20, 1917, together with filing marks thereon.

6. All exhibits offered and received in evidence during the course of the trial of said cause.

7. Copy of all the testimony adduced at the trial of Bluejacket, et al., vs. Ewert, Equity No. 2299 and Redeagle vs. Ewert, Equity No. 2293, together with the minutes of the court showing the consolidation for trial of both of said cases.

8. Defendant's application for praecipe for additional portions of the record to be incorporated in the record, together with the proceedings had thereon in this court.

(Signed) PAUL A. EWERT,
Attorney for Defendant.

Endorsed: Filed in the District Court on September 2, 1918.

235 (Plaintiff's Objections to Defendant's Praecipe for Additional Parts of the Record.)

The appellant objects to the following parts of the praecipe of the appellee herein and objects to the record in this case containing the matters set forth in his order number 1 calling for petition for leave to amend defendant's answer by interlineation; and order number 2 calling for Court's order to amend; order or request number 3 calling for defendant's answer as amended by interlineation with filing marks thereon; and order or request number 7 calling for copy of all the testimony adduced at the trial of Bluejacket, et al., vs. Ewert, No. 2299 and Redeagle vs. Ewert, No. 2293, together with the minutes of the court showing the consolidation for trial of both of said cases, on the grounds that the same has been called for by the appellant.

A. SCOTT THOMPSON,
HIRAM W. CURREY,
Attorneys for Appellant.

Endorsed: Filed in the District Court on September 4, 1918.

236 (Order for the Transmission of Certain Original Exhibits to the Appellate Court.)

At the request of the appellants, Carrie Bluejacket, and others, by their counsel, A. Scott Thompson, it is hereby

ordered that the original Exhibits referred to and identified in the certificate of Honorable Ralph E. Campbell and attached to the record of the evidence in this case be by the Clerk of this Court properly and securely sealed and transmitted with the record in this cause to the United States Circuit Court of Appeals for the Eighth Circuit, and that this order be made part of the record on appeal, of which was done relative to said motion.

FRANK A. YOUMANS

Judge

Endorsed: Filed in the District Court on November 1918.

237

(Clerk's Certificate to Transcript.)

United States of America,
Eastern District of Oklahoma—ss.

I, R. P. Harrison, Clerk of the United States District Court for the Eastern District of Oklahoma, do hereby certify that the above and foregoing is a full, true and correct transcript of so much of the record in the case of Carrie Bluejacket et al., vs. Paul E. Ewert, No. 2299 Equity, as was ordered by the praecipe of counsel herein to be prepared and authenticated by the proposed amended petition of Plaintiffs which was made a part of the record in this case, as the same appears from the records in my office.

And I further certify that the original Citation, with service thereon, is hereto attached and herewith returned.

Seal
U. S. District Court
Eastern District
Oklahoma

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court at my office in the City of Muskogee, this 19th day of November, A. D. 1918.

R. P. HARRISON

Clerk

By H. E. Boudinot, Deputy

Filed Nov. 20, 1918. E. E. Koch, Clerk.

175 And thereafter the following proceedings were had in said cause, in the Circuit Court of Appeals, viz:

(Appearance of Mr. Hiram W. Currey and Mr. Arthur S. Thompson as Counsel for Appellants.)

United States Circuit Court of Appeals, Eighth Circuit.

No. 5316.

CARRIE BLUEJACKET et al., Appellants,

vs.

PAUL A. EWERT.

The Clerk will enter my appearance as Counsel for the Appellants.

HIRAM W. CURREY,

Joplin, Mo.

ARTHUR S. THOMPSON,

Miami, Okla.

(Endorsed:) Filed in U. S. Circuit Court of Appeals Nov. 25, 1918.

(Appearance of Mr. Leslie J. Lyons as Counsel for Appellants.)

The Clerk will enter my appearance as Counsel for the Appellants.

LESLIE J. LYONS.

(Endorsed:) Filed in U. S. Circuit Court of Appeals May 12, 1919.

176 *(Appearance of Mr. Paul A. Ewert and Mr. Henry C. Lewis as Counsel for Appellee.)*

The Clerk will enter my appearance as Counsel for the Appellee.

PAUL A. EWERT.

HENRY C. LEWIS.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Apr. 22, 1919.

(Appearance of Mr. W. H. Kornegay as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

W. H. KORNEGAY.

(Endorsed:) Filed in U. S. Circuit Court of Appeals May 5, 1919.

(Notice and Motion of Appellee to Dismiss.)

Notice.

To the appellants in the above-entitled action and each of them to Hiram W. Currey, A. Scott Thompson, and Leslie J. I. their attorneys:

Please take notice, That the Appellee herein has filed his motion to dismiss the appeal taken in this cause, a copy of which is attached to this notice, that the said motion will be heard by the above named Court on Saturday, May 10th, 1919, or as soon thereafter as the Court may be heard, in the city of St. Paul, State of Minnesota.

177

PAUL A. EWERT,
Appellee, pro

Received copy of this paper this May 7, 1919 at 4:45 P. M.
HIRAM W. CURREY,
Attorney for the Appellants

* * * * *

Motion to Dismiss the Appeal.

Comes now the appellee in the above cause and moves the Court to dismiss the appeal filed herein, and as cause therefor shows:

First. That it appears upon the face of the record and from the files in this case that the appeal was allowed and the citation of appeal issued on the 21st day of August, 1918, and that the days allowed under the rules expired on the 21st day of October, 1918, and that the transcript of the record was not filed until November 20, 1918.

Second. That the transcript of the record was filed on November 20, 1918, and the case assigned for argument by this Court on the date of Monday, May 19, 1919, and that the transcript of the record was not served upon Appellee until the 7th day of April, 1919.

Third. That this case is assigned for argument on Monday, May 19, 1919 and that the Appellants at no time filed twenty copies of their said brief in this Court or filed a brief of any kind at any time, nor have they served a copy of their said brief upon the Appellee within the time named in the rules, or at any time.

Fourth. That the transcript of the record was prepared in violation of Paragraph "B" Equity Rule 75, in that the testimony of the witnesses is not only set forth in full instead of in narrative form, but there is incorporated in the record page after page of the argument made by counsel for the plaintiffs concerning the rejection of testimony by the Court and colloquies between him and the Court, so that while the testimony itself should have occupied no more than a dozen pages, the transcript as prepared

covers one hundred and seventy-four printed pages of the record; that in addition to the printed transcript of the record, an order is attached thereto directing that there be properly wrapped and securely sealed and transmitted to the Circuit Court of Appeals 77 letters and reports which if printed would in the opinion of counsel, approximate more than five hundred pages, being exhibits that were never offered or received in evidence, only a few of them being exhibits referred to in counsel's application for leave to file an amended petition, all of said exhibits being, in the opinion of the defendant, incompetent, irrelevant and immaterial matter.

Fifth. That it appears upon the face of the record (p. 174) that the certificate of the Clerk is not in the form required by law and the rules of this Court, the said certificate being in the following language (omitting the informal parts).

"I, R. P. Harrison, Clerk of the United States District Court for the Eastern District of Oklahoma, do hereby certify that the above and foregoing is a full, true and correct transcript of so much of the record in the case of Carrie Bluejacket, et al., vs. Paul E. Ewert, No. 2299 Equity, as was ordered by præcipe of counsel herein to be prepared and authenticated, the proposed amended petition of plaintiffs which was never made a part of the record in this case, as the same appears from the records in my office."

From this certificate it appears that the Clerk has incorporated into the record certain matters which the certificate shows "was never made a part of the record in this case," to wit: the proposed amended petition of the plaintiffs.

179 It further appears from folio 11, page 162 of the record that Exhibits Numbers 12 and 13 mentioned in the approval order of the bill of exceptions by the District Judge have never been supplied, according to the Clerk's notes.

Sixth. That it appears from the record, page- 154 to 161 inclusive, that the proposed transcript of the record was not submitted to counsel for the defendant, nor to the defendant before the same was approved by Frank A. Youmans, United States District Judge for the District of Arkansas.

Seventh. That it appears from the face of the record, pages 154 to 162 inclusive, that the said bill of exceptions as approved was not approved by the Court sitting as a Court for the Eastern District of Oklahoma, but on the contrary, was settled and approved by the Honorable Frank W. Youmans, Judge of the United States District Court for the District of Arkansas, outside of the Eastern District of Oklahoma, to wit: In the city of Fort Smith, State of Arkansas.

Eighth. That the Bond on Appeal is not such a bond as is required by law and the rules of this Court, in that the said bond is not signed by the plaintiffs or any of them, the names of the several plaintiffs appearing as signed to the said bond, succeeded by the words "By Hiram W. Currey, Their Attorney, Principals." (Rec. pp. 165-166.)

Ninth. That the said record, together with the orders made by the Court sending up the 80 exhibits hereinbefore set forth contains matter not asked for in complainant's præcipe and transcript, to wit: The many exhibits set up on application of the attorneys for the plaintiff on order of Frank W. Youmans, Judge. (Rec. pp. 173-174.)

180 For the several reasons above mentioned, Appellee prays that said appeal as filed herein be dismissed.

PAUL A. EWERT,
Appellee, pro Se.

(Endorsed:) Filed in U. S. Circuit Court of Appeals May 9, 1919.

(Protest of Appellants Against Motion to Dismiss.)

Plaintiffs respectfully present the following statements in protest of the granting of defendant's motion to dismiss:

I.

In respect to the first alleged ground for dismissal, plaintiffs state that the records and files of the Clerk of this Court in this case show and contain a written order signed by Judge Stone of this Court dated October 16, 1918, enlarging the time to November 21, 1918 in which to file the transcript of the record herein, and that said transcript was thereafter filed within said time, to-wit: on November 20, 1918 (see record, p. 174). This court will take judicial notice of the contents of its own records and files and it is not incumbent upon appellants to include orders of the character of the one referred to in printing the record.

II.

In answer to the second alleged ground for dismissal, plaintiffs state that they requested the Clerk of this Court to print the record herein prior to Dec. 21, 1918, and on said notice said Clerk notified A. Scott Thompson, one of plaintiffs' attorneys, by letter that the estimated cost of printing the record was \$293.00; that there-
181 after plaintiffs' counsel advised the numerous plaintiffs, all of them Quapaw Indians—by letter at their last-known address, to supply the above sum of money; that plaintiffs' counsel was unable to get replies from said Indians, some of the letters being returned uncalled for, and afterwards on March 13, 1919, counsel paid said sum to the Clerk of the Court, as appears from copies of three letters attached hereto, marked Exhibits 1, 2, and 3: that the Clerk of this Court proceeded to print said record and sent copies thereof to plaintiffs' counsel, which were received on April the 4th or 5th, 1919, and copies duly served on the defendant April 7, 1919.

III.

answer to the third alleged ground for dismissal, plaintiffs state their counsel have been prevented from preparing, printing and filing the brief required within the time required by the rules of court for the reasons set forth in Paragraph IV of their motion to consolidate this case with case No. 5315, pending in this Court, entitled George Red Eagle et al. vs. Ewert, to which paragraph motion to consolidate, we respectfully refer the Court. Counsel further state on behalf of plaintiffs that they will, if permitted, prepare, print and serve briefs herein at any date hereafter the Court may designate, and assert that they have no desire or intention to delay the hearing of this case, but believe that under the facts and circumstances stated in their motion to consolidate said motion that the Court should grant said motion to consolidate, and that the two cases be heard together for the purpose of saving time, and expense to plaintiffs and defendant herein.

IV.

answer to the fourth alleged ground for dismissal, the plaintiffs state that they requested Judge Frank A. Youmans to specify and order that the testimony be set out in full instead of being reduced to narrative form. Plaintiffs' counsel understand that equity rule No. 75 in force in this court makes provision for such procedure, and that the said Judge Youmans did so, as appears in his order of November 18, 1918, found on page 82 of the record, which is as follows:

"And upon request of appellants it is ordered that the evidence in the bill of exceptions be certified and transferred to the Court of Appeals without being reduced to narrative form."

Plaintiffs further state that the defendant herein filed a praecipe in District Court on August 30, 1918, long prior to the order of Judge Youmans above quoted, in which the said defendant requested that record be prepared in said manner, which request is found on page 170 of the record and is as follows:

"Copy of all the testimony adduced at the trial of Bluejacket et al. vs. Ewert, Equity No. 2299, and Red Eagle vs. Ewert, Equity No. 5315, together with the minutes of the Court showing the consolidation of the trial of both of said cases."

Plaintiffs state that defendant is now estopped to in good faith dispute the conduct of plaintiffs in requesting Judge Youmans to issue the order requiring all of the testimony to be printed.

As to the statements made in defendant's motion to consolidate, in respect to the order contained in the record, directing that there be a copy of the testimony wrapped and securely sealed and transmitted to the Court of Appeals, seventy-seven letters and reports, being the

179



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exhibits that were referred to in the proposed and offered amended petition submitted to Judge Campbell. In connection with
 183 plaintiffs' motion to re-open the case, plaintiffs state that inasmuch as Judge Campbell refused to permit said case to be re-opened and the amended petition to be filed in said cause, and refused to receive and admit the exhibits tendered in connection with said proposed and offered amended petition, there was no other way to present said matters to this court except to have them transmitted in the manner ordered by Judge Youmans (R. p. 173-174). Plaintiffs further suggest and insist that the matters referred to are not grounds for dismissal and will not be considered by the court as such.

V.

In answer to the fifth alleged ground for dismissal, these plaintiffs state that they do not know or understand how the Clerk of the District Court for the eastern district of Oklahoma, in his certificate attached to the transcript of the record, included the provision complained of by defendant as follows; to-wit:

"The proposed amended petition of plaintiffs which was never made a part of the record in this case."

Plaintiffs state that their counsel prepared the certificate for the Clerk to sign, which was in the usual form and which did not contain the provision quoted; that said transcript was settled and approved by Judge Youmans at Fort Smith, Arkansas, and was transmitted to the Clerk at Muskogee, Oklahoma, and that counsel for plaintiffs were unaware that said certificate contained such a provision until they were served with defendants' motion to dismiss. Plaintiffs respectfully suggest and insist that the matter suggested by defendant in connection with said certificate is not a ground for dismissal; that whether said proposed amended petition was under the circumstances in this case actually made a part of the record is a

184 matter of law to be determined by this Court from all of the facts and circumstances, and that the statement contained in said certificate of said Clerk is a mere conclusion of the Clerk and constitutes no valid ground for the dismissal of said appeal.

VI.

In answer to the sixth alleged ground for dismissal, plaintiffs counsel who submits this protest on behalf of plaintiffs, was not present and does not personally know any of the circumstances in connection with said matter, except as they are set forth in the record printed in this case and found on pages 154-161 inclusive. From the reading of said pages it appears that defendant was given an opportunity to examine the transcript of the record, but because Judge Youmans was engaged in the trial of cases at Texarkana, Arkansas, he advised counsel for plaintiff, as appears from letter of H. W. Curry, one of plaintiffs' counsel (record page 158).

addressed to the defendant herein on November 15, 1918, that it would be necessary to take the matter up at Fort Smith instead of Muskogee, and thereupon Mr. Curry wrote Mr. Ewert the above-mentioned letter and sent the transcript to him, as set forth in Mr. Ewert's affidavit and that of his stenographer and the other correspondence and records therein set forth. Plaintiffs suggest and insist that said matters do not constitute ground for dismissal.

VII.

In answer to the seventh alleged ground for dismissal, plaintiffs state the fact to be that said transcript was settled and approved by Judge Youmans at Fort Smith, Arkansas, and outside of the Eastern District of Oklahoma. Counsel do not know what the records of this Court show as to the assignment of Judge Youmans to the Eastern District of Oklahoma, but allege and state that Judge Youmans held, as a matter of fact, sit on a number of cases at Muskogee, Oklahoma after the resignation of Judge Campbell and before the appointment of Judge Williams to succeed him, and that 85 counsel believe and understand that he was regularly assigned to said Eastern District of Oklahoma, and that the regularity or irregularity of his conduct in settling and approving the transcript of the record in this case under the circumstances shown by this record, is a matter of law which should be determined by this Court upon hearing upon the merits, and does not constitute a valid ground for dismissal of this appeal.

VIII.

In answer to the eighth alleged ground for dismissal, counsel states that they were unable to get in touch with the plaintiffs for their signature to said bond; that counsel were employed and requested to appeal said cause by said plaintiffs and were duly authorized thereunto, and that such employment carried with it an implied power to execute said bond, and that said bond was signed by said plaintiffs by their attorney, H. W. Curry, and presented to Judge Campbell, and by him approved (see record, p. 167). Plaintiffs suggest and assert that whatever may — the right of the plaintiffs to ratify or to disapprove the conduct of their counsel in the execution of said bond, the defendant certainly cannot challenge the sufficiency thereof in the manner attempted herein, and that the alleged defect in said bond is no ground for dismissal, but should have been reached by timely and proper objections, and not by motion to dismiss this appeal.

IX.

Plaintiffs in answer to the ninth alleged ground for dismissal state that what they have said in answer to Paragraph IV above concerning the certified photographic copies of correspondence between the defendant and the Department of the Interior and the Department of Justice, applies also to the points reached in this

paragraph of defendant's motion to dismiss; that inasmuch as said exhibits were not received and admitted in evidence by Judge

Campbell, these plaintiffs have no other alternative except
186 to procure an order from the trial court transmitting said exhibits to this Court for its consideration. Plaintiffs therefore suggest and insist that the matters and facts set forth in said ninth paragraph do not constitute grounds for the dismissal of this appeal.

On behalf of plaintiffs' motion to consolidate the cases involved herein, counsel respectfully states:

That the motion sets out in full the reasons therefor, the principal one being that the two cases were consolidated for trial purposes and involved the same evidence, the same questions of law to a very large extent, and ought to be heard in this Court together. We are unable to explain why the defendant in the oral presentation of this motion this morning insisted upon qualifying the fact of consolidation for trial purposes which is clearly shown by the printed record. We refer Your Honors to Judge Campbell's order which we read to your Honors this morning and found on page 87. We also refer the Court to præcipe set out on page 170 prepared and filed herein by the defendant himself and also præcipe filed by the defendant in the Red Eagle case and set out on page 256 of the transcript on file with the Clerk herein. In the seventh paragraph thereof defendant asks that all of the testimony adduced at the trial of the Bluejacket case and the Red Eagle case, together with the minutes of the Court "show the consolidation for trial of both of said cases." Under this statement of the record there can be no doubt of the actual consolidation of the two cases for trial purposes.

It seems to counsel for plaintiffs that there is but a single question involved in these motions, and that is whether or not the Court will dismiss this appeal because of the delay in filing and serving

the printed record within the time required by the rules
187 of this Court, and for failure to prepare, file and serve briefs within the time. This question is of course within the

sound discretion of the Court, and we respectfully submit that the unprecedented condition of the docket in the United States District Court on account of the resignation of Judge Campbell and the delay incident to the appointment of Judge Williams, and the consequent congestion of a large number of very important cases, in which counsel for the plaintiffs in these cases are involved, and the other circumstances set forth in the motion to consolidate and continue these cases, justify the Court in exercising its discretion in permitting the briefs to be filed out of time and that the cases be consolidated.

I am requested by Mr. Curry and Mr. Thompson, counsel for the plaintiffs herein to say that they regret exceedingly the embarrassment that confronts them in this matter, and deprecate the trouble that this matters puts this Court to, but under the circumstances the situation was unavoidable. They regret furthermore

at pressing engagements prevent them from being here personally present this matter to the Court.

Under all of the circumstances we submit that the motion to dismiss should be overruled and the motion to consolidate and to continue the cases should be granted.

Respectfully submitted,

LESLIE J. LYONS,
Atty. for Plfs.

Copy.

St. Louis, Mo., December 21, 1918.

Scott Thompson, Esq.,
Miami, Oklahoma.

DEAR SIR:

The estimated cost of printing the record in the case of Carrie Bluejacket et al., appellants, vs. Paul A. Ewert, No. 5316, is Clerk's fees for preparing the record, etc., \$58.00 and printing \$235.00, making a total of \$293.00 to be deposited by your client when you desire to have the record printed.

Yours truly,

(Signed)

E. E. KOCH,
Clerk.

March 8, 1919.

Hon. E. E. Koch,
Clerk U. S. Circuit Court of Appeals,
St. Louis, Mo.

DEAR MR. KOCH:

In re Carrie Bluejacket et al. vs. Paul A. Ewert, No. 5316.

Some time ago you wrote me a letter in which you stated the cost of printing record in the above styled cause. I have searched for the letter, but have been unable to find it. We want this record printed at once. If you will kindly send me the figures by return mail I will return check to you therefore. Please arrange to proceed at once to get this record out.

Yours very truly,

T.C.

March 13, 1919.

Hon. E. E. Koch,
Clerk U. S. Circuit Court of Appeals,
St. Louis, Mo.

189 DEAR SIR:

Please find enclosed my check for \$293.00 for deposit to cover printing and preparation of the record in Carrie Bluejacket and others vs. Paul A. Ewert, No. 5316. Kindly proceed at once with this matter so that we may obtain the record at an early date.

Yours very truly,

T.—C.
Encl.

(Endorsed :) Filed in U. S. Circuit Court of Appeals May 12, 1919.

(Answer of Appellee to Protest of Appellants against Motion to Dismiss.)

Replying to plaintiff's protest against defendant's motion to dismiss, appellee shows to the court that the answer or protest of plaintiff's and their attorneys to the defendant's motion to dismiss, is not sufficient and is not an answer in law to the reasons for dismissal set forth in appellees' motion.

Appellants have not conformed to a single rule of this court in the preparation of their transcript and the service thereof, and the filing and serving of the brief,—in matters that are vital to the appeal and particularly in the following respects:

Rule XIV, Par. III has been violated.

This rule is as follows:

"No case will be heard until twenty-five copies of the printed transcript, of the record, containing in themselves, and not by
190 reference, all the papers, exhibits, depositions, sketches, drawings, photographs, maps, blue prints, and other proceedings, which are necessary to the hearing in this court, printed title pages in the form prescribed in Section five of Rule 26."

The record in this case does not contain all the papers as shown by the clerk's memoranda and his certificates. On page 162 of the record, following the approval of the Bill of Exceptions, the clerk makes the following note:

"(CLERK'S NOTE.—(Exhibits) Twelve and Thirteen mentioned above "to be supplied" have never been supplied by either party to this suit.)"

It thus appears that notwithstanding the Clerk's certificate, record page 174, that not all of the exhibits appear in the printed transcript.

Under Rule 14 Para. 3, above quoted, it is requisite that the printed record, "contain in itself not by reference," all the papers, exhibits, etc. Notwithstanding this rule of this court, Judge Youmans ordered original exhibits to the number of seventy-seven, which in no ways appears in the printed record or in the certified record to be made a part of the record, and transmitted to this court. Printed record page 153, and pages 173-4.

It will thus appear that the record, as it now stands in this court, is in violation of the rule of this court at both ends, to-wit: It does not contain a complete record and all of the record because of omissions. It contains many other things not properly in the record by certificate of the lower court.

In this respect attention is called to paragraph One of Appellants' protest, wherein they claim that they procured an order of enlargement of time in which to file in this court the transcript of the record. If such an enlargement was in fact made by a properly authorized court, it must appear in the printed record, and it is no excuse to say that there is on file somewhere, an order of enlargement. No application has been made by appellants for certiorari, and therefore, plaintiffs, the appellants herein, by their paragraph One, of their protest, do not make legal answer to the first cause for dismissal assigned by the appellee.

Second.

Appellants' second paragraph attempts to excuse the failure to prepare and print the record, and serve it within the time by saying that they wrote their clients about the money for printing the record, but received no answer from some of them. This does not excuse either them or their attorneys,—and Appellee, Paul A. Ewert, states upon his honor, that he has been advised and believes it to be true, that the attorneys for the Appellants, "snitched" the above case, taking it on a percentage basis, agreeing to pay all costs, etc., if Appellants would permit said attorneys to institute said case against said Ewert. However, the allegation of Appellants' attorneys is not even excused as made, by reason of the fact that the appeal was taken in August, and the transcript filed on November 20th, and yet they did not send their money on to the Clerk for printing the transcript until March 3, 1919, well knowing that the Clerk of this court must have some time to edit the transcript and have it printed. The transcript was due to be served on March 20th and yet was not served on the Appellee until April 7, 1919.

Third.

Appellants' attempt to excuse their absolute failure to file any brief in this court because they say that the Red Eagle case was consolidated with this case. Nevertheless they printed and offered as the transcript of the record in this case, a certain printed book, which the Clerk certifies contains all the record and all exhibits. In order that the court may know the truth containing the claim that these

cases were consolidated, and that there is evidence in the Red Eagle case that is not found in this case, the Bluejacket case. 192 it should examine the transcript of the Red Eagle case, not yet printed but on file and in the hands of this Clerk of this court. Appellee states to the court that the transcript in the Red Eagle case is a carbon copy of the transcript in this case, except that in the Red Eagle case here was additional testimony offered showing the rental value of the lands described therein during the period of possession by Ewert. Your Honors, there isn't a thing to this claim, it is bogus in every respect.

It is further submitted that all there is in either of these cases, is the one question of law. Was the purchase of the lands by Ewert a violation of public policy, notwithstanding the facts that he was not an employe of the Department of the Interior, never saw any of the Indians, or spoke with any of them; bought the land of the Secretary of the Interior as the highest and best bidder, and did so with the knowledge, consent and approval of his superior officer, the Attorney General of the United States, and the Secretary of the Interior of the United States, who advertised the lands for sale under the laws of the United States. Ewert simply making his bid to the Secretary of the Interior, under a printed advertisement posted in the Post Office and other public places,—every Attorney General and every Secretary of the Interior since that time holding that Ewert was within his rights in putting in his bid, purchasing at public sale.

And whether or not the Indian whose land was sold by the Government according to law, can himself raise the question under Section 1078 of the Revised Statutes of the United States,—or whether the United States alone can question the transaction, if it be in fact,—an unlawful one or against public policy,—Ewert being solely an attorney, working under the Attorney General of the United States at a stipulated salary per month for the purpose of bringing certain suits for the United States, known in the pleadings, as "Marshall's Deed" cases.

193

Fourth.

Appellants' Paragraph Four is an attempt to answer the fourth reason set forth in plaintiffs' motion for dismissal, and it is not an adequate answer. Defendant's præcipe did call for all of the testimony, but it must be presumed that all of the testimony could be incorporated under Equity Rule 75, which makes it incumbent upon the Appellants to set forth in narrative form the testimony adduced,—but Appellants have not only set forth the testimony adduced, but caused to be inserted many pages of argument and colloquay between counsel and the Court,—and in addition to that the record shows that Appellants did not give to the Appellee, Ewert, a copy of the record that they proposed to submit to the court for his inspection, nor adequate notice of the attempt to have it settled by Judge Youmans of Fort Smith, Arkansas, without the Eastern District of Oklahoma.

Fifth.

Appellants' answer to appellee's fifth reason for requesting the dismissal of this appeal, begs the question. The laws says what kind of certificate the Clerk must attach to the transcript.

Appellants say they were unaware of the form of certificate, but the certificate is theirs and the transcript is theirs, and does not belong to the appellee in this case, they are bound by it. Notwithstanding the certificate of the Clerk, counsel have put into this record everything they wanted to put in, and excluded from it everything they wanted to exclude, and then by separate order, attempted to add seventy-seven other exhibits, never after any fashion, a part of the case.

Sixth.

The attempt of Appellants to answer the sixth cause of Appellee for dismissing appeal, is without merit. On page 154 of the printed record appears the statement of Ewert, supported by affidavit. 194 It appears from this statement and supporting affidavit, page-159-60-61, that the Clerk for the attorney for the Appellants, brought the proposed record to Ewert's office for his approval or O. K., but refused to leave it for Ewert's examination. A record so submitted is worthless under the rules of this court, and the Equity rules for this Circuit.

Seventh.

It is submitted that if Judge Youmans was the duly assigned Judge during the entire vacant period of the Judg-ship of the Eastern District of Oklahoma, that he could not act while without the district, but such duty devolved upon a Judge of the Court of Appeals.

Eighth.

Plaintiffs' eighth answer to the defendant's motion to dismiss the appeal, is without merit. Counsel had six months to appeal this case. If their clients were interested in the case at all, they would have signed the appeal bond. Appellee says that he is informed and believes that the plaintiffs refused to sign the bond because they had no interest in the case, and refused to be responsible for any costs incurred, because the attorneys themselves assumed all liability for costs. A federal question is involved, and this case may go to the Supreme Court of the United States if it gets thru this court, and some person must be responsible for costs. The bond as it stands is worthless, and Appellee should be indemnified against costs incurred in what is shown by the pleadings, to be a spite suit.

Ninth.

It is apparent from the record that counsel in this case must have deceived the trial court, Judge Campbell, when they got him to sign the certificate appearing on page 153 of the record. This certificate

prepared by counsel for the signature of Judge Campbell, that the Court considered the exhibits that were offered to him in support of the motion and amended petition, and yet on page 163 of the record, under Assignment No. 2, Counsel says

"The Court erred in refusing to consider as evidence in the case the exemplification presented to the Court with the motion for leave to amend, refusing to consider the petition, etc."

Motion for Consolidation a Subterfuge.

The motion for consolidation with the Red Eagle case is merely a subterfuge to gain time. The transcript in the Red Eagle case is identical with the transcript in Bluejacket case, in fact it is a carbon copy, except a few pages additional, devoted exclusively to the value of the Red Eagle land for rental purposes during the period that Ewert has held the land. The same law question is involved in both cases, and after the Court had heard the Bluejacket case upon its merits, he let the evidence on the question of law, as adduced in Bluejacket, stand as evidence adduced in the Red Eagle case, and after that fashion only, were the cases consolidated. The Red Eagle case is about to be disposed of by the Finding of Judge Williams that Red Eagle was competent, and in good faith dismissed the appeal under the stipulation. Judge Williams so indicated at the hearing recently held. In any event, the Bluejacket case should be dismissed for the reasons hereinbefore set forth. If Appellants desired a continuance or consolidation they should have acted timely—they didn't do it.

Respectfully submitted,

PAUL A. EWERT,
Appellee.

(Endorsed:) Filed in U. S. Circuit Court of Appeals May 13, 1919.

196 (*Order of Submission of Motion to Dismiss, etc.*)

May Term, 1919.

Monday, May 12, 1919.

This cause came on this day to be heard on the notice and motion of appellee to dismiss the appeal and the notice and motion of appellants for consolidation of this cause with cause No. 5315, John S. Kendall, as Administrator, etc., et al. v. Paul A. Ewert, and for a continuance, Mr. Paul A. Ewert, pro se, appearing in support of said motion to dismiss and Mr. Leslie J. Lyons appearing in support of the motion for consolidation and continuance, and after hearing counsel the said motions were by the Court taken under advisement.

Order Denying Motion of Appellee to Dismiss Appeal and Motion of Appellants for Consolidation with Case No. 5315 and Granting Continuance.)

May Term, 1919.

Friday, June 6, 1919.

This cause came on to be heard on the motion of appellee to dismiss the appeal and the motion of appellants for a consolidation of this cause with cause No. 5315, John S. Kendall, Administrator of the estate of George Redeagle et al. v. Paul A. Ewert, and for continuance.

On consideration whereof, it is now here ordered by this Court, that said motion of appellee to dismiss the appeal herein and the motion of appellants for a consolidation of this cause with said cause No. 5315, be, and the same are each hereby, denied; and it is further ordered that the motion of appellants for a continuance of this cause be and the same is hereby granted.
June 6, 1919.

(Order of Submission on Merits.)

December Term, 1919.

Tuesday, December 2, 1919.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Hiram W. Currey for appellants and concluded by Mr. Paul A. Ewert, Pro se.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

(Opinion.)

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1919.

No. 5316.

CARRIE BLUEJACKET et al., Appellants,

vs.

PAUL A. EWERT, Appellee.

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

Mr. Hiram W. Currey (Mr. A. Scott Thompson was with him on the brief), for appellants.

Mr. Paul A. Ewert, pro se.

Before Sanborn and Stone, Circuit Judges, and Munger, District Judge.

The Appellants (hereinafter called plaintiffs) brought suit to cancel a conveyance of land in Ottawa, Oklahoma, made by them to appellee (hereinafter called defendant). From a decree dismissing the bill this appeal is prosecuted. The land had been allotted to Charles Bluejacket, an Indian of the Quapaw tribe, under the provisions of the Act of Congress of March 2, 1895 (28 Stat. 876, 907), and a patent had been issued to him, containing a restriction upon alienation within twenty-five years from its date. Charles Bluejacket died intestate in 1907 leaving as his heirs the plaintiffs and others, who are not parties to this suit. The conveyance to defendant by the widow, the adult heirs, and the guardians of the minor heirs of Charles Bluejacket was executed on April 8, 1908, under the authority of that portion of Section seven of the Act of Congress of May 27, 1902 (32 Stat. 245, 275), which reads as follows:

199 "That the adult heirs of any deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him may sell and convey the lands inherited from such decedent, but in case of minor heirs their interests shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the guardian, but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee."

The bill alleges as the grounds for setting aside the conveyance that the grantee was disqualified and prohibited by law from receiving the conveyance and that no report of the guardians' deed and sale was approved by the county court which had appointed them.

Before the proceedings were taken for the sale of plaintiffs' lands, the Secretary of the Interior had adopted a set of rules and regulations applying to proposed sales of inherited Indian lands under the provisions of the statute last quoted and compliance with them was a condition upon which his approval of any conveyance depended. These rules required that a minor heir's interest could only be conveyed by a guardian duly appointed by the proper court, and upon the order of such court, made upon a petition filed by the guardian, but all such conveyances were subject to the approval of the Secretary of the Interior. The owners of inherited Indian land who desired to sell it were also required to petition the Indian agent having charge of the territory wherein the land was situated asking to have the land sold in accordance with the rules of the Secretary, and agreeing that the proceeds of the sale should be placed in designated banks, and its withdrawal was subject to the approval of officers of the Indian department. The Indian agent

if satisfied that the facts alleged in the petition were sufficient, would file the petition and send a copy to the Commissioner of Indian Affairs. The agent was required to post in a conspicuous place in his office for the period of sixty days, a list of the lands, the names of the owners and the dates when bids would be opened. When any land had been posted for sale it was the Indian agent's duty to view and appraise it, make a certificate of the appraisal, seal it, and not to open it until the date of sale. The appraisement was not to be made public either before or after the sale and no bid for less than the appraised value was to be considered. No Indian agent nor any one connected with the agency office could prepare or assist in preparing the bid of any prospective purchaser. The bids were received in sealed envelopes, with the date marked thereon when they were to be opened. The right to reject any and all bids was reserved and the acceptance of all bids was subject to the approval of the owner of the land. Lands not disposed of at the appointed time could, if the owner so desired, be re-listed and offered for sale after thirty days advertisement, under the same rules that governed their original listing. The Commissioner of Indian Affairs was required to advertise in some local paper of general circulation near the lands the proposed sale of lands and inviting bids therefor and a list of the lands offered for sale was also to be published in the weekly edition of the newspaper of widest circulation in the county where the lands were situated.

The deed of conveyance was required to be submitted for the Secretary's approval, accompanied by the original petition, the appraisal, all bids, checks received to apply on payment, a report by the agent of all proceedings prior to the execution of the deed, together with a certificate from the agent that the deed was fully explained to the grantors; that the consideration was the fair price for the land and that the conveyance was free from fraud and deception. The purchase price in no case was to be paid to the grantors, but deposited in a bank, or paid to the Indian agent, for the benefit of the grantors, when the Secretary should have approved the deed. Affidavits of grantors and grantees were required with the deed, showing that there was no contract, agreement or understanding, oral or written, for the refunding of any of the consideration money to the purchaser, or for the exchange of any property in lieu of the consideration money. The grantee's affidavit was also required to the effect that he was not a party to any association of persons to acquire such lands at less than their fair value, to prevent open and fair competition in the purchase; that the contract was not procured by false representations to the grantor, or suppression of facts as to the value of the land or any other feature of the transaction and that neither the grantor nor any person for him had been given or promised any money or thing of value, except the consideration, to induce him to agree to the sale of his land. The form of deed was also prescribed by the rules.

The plaintiff in June, 1908, filed a petition with the Indian agent for the Quapaw tribe praying for the sale of these lands and agreeing to be bound by these rules governing the sale of such lands. The lands were listed for sale and the time for opening bids fixed for August 17, 1908. An appraisal was also made. This appraisal was kept secret until after the execution of the deed, its approval by the Secretary of the Interior and its delivery to defendant.

Early in July, 1908, petitions were filed with the County Court of Ottawa County by the guardians of those of the plaintiffs who were then minors, praying for authority to make sale of the wards' shares in the lands and to join with the other heirs in such sale. The adult heirs waived notice of the hearing upon these petitions and on July 17, orders were entered by the county judge authorizing the guardians to sell the minors' shares according to the rules prescribed by the Secretary of the Interior, and directing a report of the guardians' proceedings under the order. It seems to be conceded by counsel that the proceedings leading up to the deed were substantially as now recited. At the first date fixed for opening bids, one Hughes presented a bid for the lands of \$4,000.00 which was rejected as below the appraised value. The lands were offered a second time but at the time fixed for receiving bids, September 1, none had been received. The lands were offered a third time, but at the time fixed, October 26, no bids were received. The lands were again offered for the fourth time on November 27, but no bids were received. Bids were invited for the fifth time and on December 21, the defendant filed a bid of \$4,000.00 which was rejected as below the appraised valuation. At the sixth offering of the lands on January 25, 1909, the defendant filed a bid of \$4,680.00 which was again rejected as below the appraised valuation. At a seventh offering of the lands on February 22, 1909, the defendant bid \$4,000.00 for a portion of the lands, but this bid was rejected. The lands were again offered for the eighth time on March 29, 1909, and the defendant's bid of \$5,000.00 was accepted. The deed to the defendant was then executed in April, 1909. It was approved by the Secretary of the Interior on July 26, 1909, delivered to defendant and

202 recorded, and defendant took possession some time afterward.

MUNGER, *District Judge* (after stating the facts as above), delivered the opinion of the Court.

Complaint is made because the court refused to permit the plaintiff to file an amended bill, and to set aside the submission of the case and allow further testimony on behalf of the plaintiff. The application was made eleven weeks after the case had been heard upon the pleadings and the testimony. The showing in support of the application is of great length but a recital of its merits would not be profitable. There was no error in refusing the application. It is also urged that a confirmation by the county court of the report of the guardians' sale was essential to convey the title of the wards. Neither the statute authorizing the sale of such lands nor the rules of the Secretary of the Interior make such a requirement and the

authority of Congress was plenary in fixing the conditions upon which sales of these Indian lands would be permitted.

The claim that defendant was disqualified from purchasing the land is founded upon the provisions of Section 2078 of the Revised Statutes, as follows:

No person employed in Indian affairs shall have any interest or concern in any trade with the Indians, except for, and on account of, the United States; and any person offending herein, shall be liable to a penalty of five thousand dollars, and shall be removed from his office."

All the facts shown in evidence in relation to Mr. Ewert, the defendant, that are claimed to bring his purchase within the condemnation of this statute may be shortly stated. Mr. Ewert was an attorney at law formerly residing in Minnesota. On October 23, 1903, the Attorney General of the United States appointed him as a Special Assistant to the Attorney General to assist in the institution and prosecution of suits to set aside deeds made to certain allotments of the Quapaw Indian agency. His official residence was fixed at Miami, Oklahoma. He removed to Oklahoma, going first to Muskogee and remaining there the greater part of November. About the first of December he moved to Miami and appears to have continued to reside there for some months thereafter. These facts sufficiently show that he was employed in Indian affairs. Although he was an appointee of the Department of Justice, his business was only in connection with Indian lands and litigation concerning them. The statute does not regard the department from which comes the appointment but the department in connection with which the services are rendered. Do the facts show that the defendant had an interest in any trade with the Indians? In *United States v. Douglas*, 190 Fed. 482, this court reviewed the history of legislation relating to the statute in question and outlined the legal meaning of the word "trade" as used in the statute. It was so said:

The statute in question, being penal in nature, should, of course, be strictly construed. There is little if any conflict as to the usual ordinary meaning of the word 'trade.' It is defined in Webster's International Dictionary as: 'the act or business of exchanging commodities by barter or by buying and selling for money; commerce; trade; barter.'

The Century Dictionary defines it as 'the exchange of commodities for other commodities or for money. The business of buying and selling, dealing by way of exchange, commerce, traffic. Trade comprehends every species of exchange or dealing either in the use of land, in manufactures, or in bills or money.'

In the New American Encyclopædic Dictionary it is defined as 'act, occupation or business of exchanging commodities for other commodities or for money. The business of buying and selling; dealing by way of sale or exchange; commerce; traffic.'

"In *Bouvier's Law Dictionary* it is said: 'In its most extensive signification, the word includes all sorts of dealings by way of sale or exchange.'

"In *Rapalje and Lawrence's Law Dictionary* it is defined as 'traffic; commerce; exchange of goods for other goods or for money.'

"In 28 *American and English Encyclopædia of Law*, 2d ed. 338, it is said: 'In ordinary language the word 'trade' is employed in three different senses; First, in that of the business of buying or selling; second, in that of an occupation generally; and third, in that of a mechanical employment in contradistinction to agriculture and the liberal arts.'

"In *May v. Sloan (May v. Rice)*, 101 U. S. 237, 25 L. ed. 797, it is said: 'The word 'trade', in its broadest signification, includes not only the business of exchanging commodities by barter, but the business of buying and selling for money, or commerce and traffic generally.'

"In *Queen Ins. Co. v. State*, 86 Tex. 250, 22 L. R. A. 483, 24 S. W. 397, and in *Texas & Pacific Coal Co. v. Lawson*, 89 Tex. 401, 34 S. W. 920, it is said: 'The word 'trade' means traffic, which is defined to be the passing of goods and commodities from one person to another for an equivalent in goods or money.'

"It has further been judicially defined as: 'the exchange of commodities for other commodities or for money; the business of buying and selling; dealing by way of sale or exchange.' In *re Grand Jury (D. C.)*, 62 Fed. 840; *United States v. Cassidy (D. C.)*, 67 Fed. 705; *United States v. Coal Dealers' Asso. (C. C.)* 85 Fed. 265.

"Similar citations could be almost indefinitely multiplied. It is manifest that, if the word 'trade' was employed in the statute in question in its ordinary use and acceptance, the defendant had both interest and concern in trade with the Indians on her own account, and not on account of the United States."

The statute was held to apply to the purchase by an industrial teacher at the Indian agency of cattle from the Indians on the reservation, because such a person might be expected to wield a large influence and such an influence should not be used to subserve self interest in barter with the Indians. The facts in the present case do not disclose the direct exertion of any influence over the Indians. It is not shown that the defendant ever saw or communicated with any of the plaintiffs or that the Indians were conscious that defendant was employed in Indian affairs. The presumption is that the rules established by the Secretary of the Interior governing sales of inherited Indian lands were followed by the officials in charge of that sale; that defendant's bid for these lands was delivered to the Indian agent and by him transmitted to the Secretary, together with all the proceedings and the report of the agent, and with a showing that there was no agreement or understanding between defendant and plaintiffs. So far as appears the defendant was but a passive recipient of a conveyance from the Indians. Exercising its undoubted authority, the government offered the property for sale, advertised it, made the appraisal, received the bids, decided upon approval of its acceptance by the Indians, approved the

and controlled the receipt and disposition of the purchase price. defendant, therefore claims that he was not engaged in any with the Indians, but that his dealing was with the United States. This view ignores the fact that the plaintiffs in deciding to refuse or accept defendant's bid, and in executing the deed as grantee may have signed it because of confidence in his official position and his relation to the Indians. One purpose of the statute is to prevent the possible play of official influence over the mind of the Indian in his consideration of any proposed trade. Another purpose is to preserve loyalty, or at least disinterestedness toward the Indian's interests by those employed in Indian affairs. If it were held that the statute did not apply to a situation where an official of the Indian department and the Indians were dealing with each other, the way would be open for employees and officers of the Indian department to take advantage of their knowledge of the Indian's affairs and of their needs, to make purchases or sales for their own benefit through third persons, agents and corporations. It would allow officers and employees of the Indian department at Washington or at any agency could trade with Indians living at a distance who were not acquainted with their official positions. The statute is confined in terms to trade with the Indians, when the Indian is ignorant of the position of the official, nor when an effect upon the Indian is produced by the use of his official position is demonstrated, and such a construction would be contrary to the practical interpretation that has been placed upon the statute by the Indian department ever since its enactment. The conclusion is that the statute applied to the taking of the deed by the defendant.

The plaintiff executed this deed in April, 1909, and this suit to set aside the deed was begun in June, 1916. The time within which the plaintiff grantors could have brought such a suit under the statutes of limitation applicable to suits or cases by the laws of Oklahoma had then expired. The complainants of that class were therefore obligated to plead and prove the facts and circumstances showing that they were not guilty of laches, in order to maintain their suit after the lapse of time fixed by the analogous statute of limitations. *Kelly v. Boettcher*, 85 Fed. 55; *Redd v. Brun*, 157 Fed. 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

date of his death is not shown. Whether guardianship of any of these minors has been terminated is not shown. By Sec. 6583 of the Revised Laws of Oklahoma (1910) it is provided:

"No action for the recovery of any estate, sold by a guardian, can be maintained by the ward, or by any person claiming under him, unless it is commenced within three years next after the termination of the guardianship, or when a legal disability to sue exists by reason of minority or otherwise, at the time when the cause of action accrues within three years next after the removal thereof."

The suit of Amy and Clyde Bluejacket obviously is not barred by laches. Their right to maintain a suit to disaffirm their deed before they have attained their majority is conferred by the Oklahoma statutes. Rev. Laws, Okla. (1910) Sec. 885. *Ryan v. Morrison*, 40 Okla. 49, 135 Pac. 1049.

The suit of Blanche Bear and of Carrie Bluejacket as heirs of William Bluejacket is not shown by the bill nor by the proofs to have been begun too late to obtain the relief demanded. It was incumbent upon the defendant to show that laches existed sufficient
207 to bar their suit, if such fact did not appear from the face of the bill or in their proofs. In order to obtain a cancellation of a deed it is ordinarily necessary that plaintiffs do equity by restoring the consideration received therefor, but this rule does not apply to the disaffirmance of the deed of an infant, if prior to the disaffirmance and during infancy the consideration received has been disposed of, wasted or consumed and cannot be returned. It is not necessary to place the grantee in statu quo. *MacGreal v. Taylor*, 167 U. S. 688, 698; *Alfrey v. Colbert*, 168 Fed 231, 235. If there is no evidence that the infant has received the consideration he is not required to offer to return it. *Blakemore v. Johnson*, 24 Okla. 544, 103 Pac. 554; *Monumental Assn. v. Herman*, 33 Md. 133; *Thormaehlen v. Kaepfel*, 86 Wis. 378, 56 N. W. 1089; *Stull v. Harris*, 51 Ark. 204, 11 S. W. 104; *Richardson v. Pate*, 93 Ind. 423; *Clark v. Tate*, 7 Mont. 171, 14 Pac. 761; *Bradshaw v. Van Valkenburg*, 97 Tenn. 316, 37 S. W. 88. The presumption is that the purchase money was deposited in banks or with the Indian agent, as required by the rules. There is no evidence that shows the money to have been withdrawn either by the guardian of the minors or by the minors, or that any of it ever came into their possession. An obligation to restore to defendant the consideration for the conveyance of these lands therefore does not appear.

It appears that the defendant has mortgaged the land to secure an indebtedness of his. The mortgagee is not a party to the suit. Plaintiffs ask for a judgment against defendant equal to the amount of this encumbrance, and they also ask for an accounting for the rents and profits of the land since the date of the conveyance. We think the decree should be reversed and the case remanded with directions to grant the prayers of Amy and Clyde Bluejacket, of Blanche Bear and of Carrie Bluejacket as heirs of William Bluejacket for a cancellation of the deed from these four minor heirs to the defendant, and for an accounting and for indemnification against the ap

arent lien of the mortgage on their shares of the lands. The decree
s to the other plaintiffs will be affirmed, and no costs be adjudged
against any of the parties.

Filed March 1, 1920.

08 (Decree.)

United States Circuit Court of Appeals, Eighth Circuit, December
Term, 1919.

No. 5316.

Monday, March 1, 1920.

CARRIE BLUEPACKET, a Widow; ROSIE B. DAUGHERTY and Husband,
Edward Daugherty; Ida M. Holden and Husband, Edward L.
Holden; Walter Bluejacket, Edward Blue Jacket and Wife, Delfa
Bluejacket; Blanche Bear, Formerly Blanche Bluejacket, and
Amy Bluejacket and Clyde BluePacket, by Their Next Friend,
Carrie Bluejacket, Their Mother; Cora Arnett, Formerly Cora La
Falier, and Louis Pascal, Appellants,

vs.

PAUL A. EWERT.

Appeal from the District Court of the United States for the Eastern
District of Oklahoma.

This cause came on to be heard on the transcript of the record
from the District Court of the United States for the Eastern District
of Oklahoma, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and
decreed by this court, that the decree of the said District Court, in
this cause, be, and the same is hereby, reversed and the cause re-
manded with directions to grant the prayers of Amy and Clyde Blue-
jacket, of Blanche Bear and of Carrie Bluejacket as heir of William
Bluejacket for a cancellation of the deed from these four minor heirs
to the defendant, and for an accounting and for indemnification
against the apparent lien of the mortgage on their shares of the
lands; and that said decree of the District Court as to the other plain-
ts, be, and the same is hereby, affirmed.

It is further ordered that no costs be adjudged against any
of the parties, in this Court.

March 1, 1920.

210 In the United States Circuit Court of Appeals, Eighth Circuit

No. 5316.

CARRIE BLUEJACKET, a Widow, et al., Appellants,

VS.

PAUL A. EWERT, Appellee.

Motion for Rehearing.

Comes now the appellee and respectfully moves the Court for a rehearing and assigns as ground therefor, among other things, statutes and authorities to which the Court was not cited in the briefs, and were not considered by this Court.

I.

Section 2078, the controlling statute at bar, applies only to sales to Indians and has no relation to purchases from them.

In the Douglas case, Judge Carland made a full and careful review of the statutes in pari materia with Section 14 of the Act of
211 1834, which was codified as 2078, R. S. See transcript, U. S. v. Jennie L. Douglass, No. 3847, filed October 6, 1910, pages 17-24. His conclusion was that Section 2078 applies only to sales of merchandise to Indians; not to purchases, p. 22. That decision was overruled by Judges Adams, Smith and Amidon.

While the Court might be slow to overrule the decision in the Douglas case, because it is the law of this Court, yet we are reminded that this, of course, will be done where fully justified. In *N. P. R. R. v. Barden*, 154 U. S. 288, 321, Mr. Justice Brewer overruled himself in a prior case, saying:

"It is more important that the court be right upon later and more elaborate consideration of the cases than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examination and the test of experience."

The foregoing argument was not made in appellee's brief, and is, of course, entirely aside from whether Douglas was "employed in Indian affairs," which she assuredly was and which appellee here assuredly was not.

For the purposes of the case at bar but few comments need be added to the opinion of Judge Carland: That the plain purpose of Section 14 of the Act of 1834 was to extend to all employees of the Indian Department the selling restrictions which had theretofore been limited to those licensed officers and their subordinates specified

the chain of statutes enacted prior thereto and carried into the revised statutes in the same title as 2078.

A reading of the opinion of this Court does not disclose to counsel whether or not this Court had before it the opinion of the learned District Judge Carland in the court below in passing upon the case of *United States v. Douglas*. Because of the fact that the

2 learned court in that opinion makes a very careful review and analysis of the Indian statutes out of which Section 2078

me, we herewith set forth that opinion and ask this Court to review

It is hoped that a careful study of the opinion of Judge Carland, now one of the judges of this Court, may prove of value in determining whether or not this Court shall now grant appellee a rehearing:

"This action was brought by the United States to recover from the defendant Jenny L. Douglas the penalty of \$5,000 prescribed by Section 2078, R. S. U. S., which reads as follows:

'No person employed in Indian affairs shall have any interest or concern in any trade with the Indians, except for, and on account of, the United States; and any person offending herein shall be liable to a penalty of five thousand dollars, and shall be removed from office.'

After issue joined, the cause was tried to the court, a jury having been waived as provided by law. The material facts upon which a recovery is sought are not in dispute. They are as follows: The defendant from January 1, 1907, to October 1 of the same year was employed by the United States as industrial teacher at the Crow Creek Indian Agency, South Dakota. She is a member of the Crow Creek tribe of Sioux Indians and during the time aforesaid purchased from other members of said Crow Creek tribe about 250 head of cattle branded I. D. Such brand in connection with the number of the Indian to whom an animal is issued is placed upon cattle issued to the United States to Indians. The cattle were purchased with a view of making a profit thereby. Defendant had purchased such cattle from other members of the Crow Creek tribe for many years prior to the time mentioned herein on the understanding that the Act of July 4, 1884, 23 Stat. 94, permitted her so to do. The Act referred to is as follows:

3 "That where Indians are in possession or control of cattle or their increase which have been purchased by the Government, such cattle shall not be sold to any person not a member of the tribe to which the owners of the cattle belong or to any citizen of the United States whether intermarried with the Indians or not, except with the consent in writing of the agent of the tribe to which the owner or possessor of the cattle belongs. And all sales made in violation of this provision shall be void, and the offending purchaser on conviction thereof shall be fined not less than five hundred dollars and imprisoned not less than six months.'

Counsel for the United States contends that the law last above cited did not extend the right to purchase the cattle mentioned in said law to a person employed in Indian affairs, although the person employed might at the same time be a member of a tribe within the

meaning of the law. If the purchase of cattle by the defendant was trading with the Indians within the meaning of Section 2078, it would undoubtedly be the duty of the court to so construe said section, and the Act of July 4, 1884, so as to give effect to both and to hold that the latter Act did not give to employees in Indian affairs the right to purchase cattle, although they were members of the same tribe as those Indians from whom cattle were purchased. The vital question in this case is, was the purchase of cattle by the defendant under the circumstances detailed in the evidence trading with the Indians within the prohibition contained in Section 2078. A penal statute, if ambiguous, will be construed more strongly in favor of the defendant than it would if the statute were remedial, but in such a way as to effect substantial justice and preserve the obvious intention of the Legislature. *Bolles v. Outing Company*, 175 U. S. 262. Any doubt as to the application of a penal statute will be resolved in favor of the accused. *United States v. Sheldon*, 2 Wheaton 119. No one

can be punished for a violation of a statute unless his case is plainly and unmistakably within its terms. *United States v. Lacher*, 134 U. S. 624.

The intention of the Legislature must govern in the construction of penal as well as other statutes; and they are not to be construed so strictly as to defeat the obvious intention of the Legislature. *United States v. Morris*, 14 Peters 464; *United States v. Reese*, 92 U. S. 214; *Johnson v. Southern Pacific Co.*, 196 U. S. 1.

In construing any part of the United States Revised Statutes it is admissible and often necessary to recur to its connection in the Act of which it was originally a part. *United States v. Hirsch*, 100 U. S. 33.

It will not be inferred that the Legislature in revising and consolidating the laws intended to change their policy unless such intention be clearly expressed. *United States v. Ryder*, 110 U. S. 729; *Logan v. United States*, 144 U. S. 263. When it becomes necessary to construe language used in the revision which leaves a substantial doubt of its meaning the original statute may be resorted to for ascertaining that meaning. *United States v. Bowen*, 100 U. S. 508; *Victor v. Arthur*, 104 U. S. 498.

If there be any ambiguity in a section of the United States Revised Statutes, resort may be had to the original statute from which the section was taken to ascertain from the language and context to what class of cases the language was intended to apply. *The Conqueror*, 166 U. S. 110.

The history of prior legislation upon the same subject may be considered in determining the intention of Congress in passing a law. *United States v. Stevenson*, 215 U. S. 190.

The commissioners appointed to revise, simplify, arrange and consolidate all statutes of the United States, general and permanent in their nature, in placing Section 2078 in the Revised Statutes of the United States, declared that they took the same from the Act of June 30, 1834, 4 Stat. 738. Section 14 of the Act of June 30, 1834, reads as follows:

215 "That no person employed in the Indian Department shall have any interest or concern in any trade with the Indians et

cept for and on account of the United States; and any person offending herein shall forfeit the sum of five thousand dollars, and upon satisfactory information of such offense being laid before the President of the United States, it shall become his duty to remove such person from the office or situation he may hold.'

We will now examine the legislation of Congress with reference to the same subject prior to 1834:

The Act of July 22, 1790, 1 Stat. 137, entitled 'An Act to regulate trade and intercourse with the Indian tribes,' provided that no person should be permitted to carry on any trade or intercourse with the Indian tribes without a license for that purpose from the proper authority and also provided a punishment for every person who should attempt to trade with the Indian tribes without such license.

The Act of April 18, 1796, entitled 'An Act for establishing trading houses with the Indian tribes,' 1 Stat. 452, provided for the establishment of trading houses at such posts and places on the Western and Southern frontiers or in the Indian country as the President should judge most convenient for the purpose of carrying on a liberal trade with the several Indian nations.

Section 2 of said Act authorized the President to appoint an agent for each trading house established by him, whose duty it should be to receive and dispose of, in trade with the Indian nations, such goods as such agent should be directed by the President to receive and dispose of. Said section also provided that such agent should take oath or affirmation that he would not 'directly or indirectly be concerned or interested in any trade, commerce or barter with any Indian or Indians whatever, but on the public account.'

This is the first time that language of this character appears in the legislation of Congress. Section 3 also provided that the agent, their clerks or other persons employed by them, should not be directly or indirectly concerned or interested in the carrying on the business of trade or commerce on their own, or any other than the public account, and also provided, if any such agent, clerk or other person employed by them should offend against said prohibition, they should be deemed guilty of a misdemeanor and upon conviction thereof should forfeit to the United States a sum not exceeding one thousand dollars and should be removed from such agency or employment and forever thereafter be incapable of holding any office under the United States.

Section 7 of the same Act provided as follows:

'That if any agent or agents, their clerks or other persons employed by them, shall purchase or receive of any Indian in the way of trade or barter a gun or other article commonly used in hunting; any instrument of husbandry or cooking utensil of the kind usually obtained by Indians in their intercourse with white people; any article of clothing (except skins or furs), he or they shall respectively forfeit the sum of one hundred dollars for each offense.'

It clearly appears from this Act of April 18, 1796, that Congress was not of the opinion nor did it intend that the punishment therein provided for agents, their clerks or other persons employed by them

for being directly or indirectly concerned or interested in the business of trade or commerce on their own or any other than the public account applied to or prohibited such agent, clerk or employee from purchasing or receiving from any Indian the property described in Section 7, above quoted, otherwise why should Section 7 have been enacted at all. The Act of May 19, 1796, entitled 'An Act to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontiers, provided for the issuing of licenses to a trade with the Indians and for a penalty for trading without a license, and in Section 9 made the same provision practically as was contained in Section 7 of the Act of April 18, 1796.

217 Section 10 of the same Act provided that no person should be permitted to purchase any horse of an Indian or of any white man in the Indian Territory without special license for that purpose, and also provided if any person should purchase a horse in violation of said section he should be punished by forfeiting a sum not exceeding one hundred dollars and be imprisoned not exceeding thirty days.

Section 11 of the same Act provided, "That no agent superintendent or other person authorized to grant a license to trade or purchase horses shall have any interest or concern in any trade with the Indians or in the purchase or sale of any horse to or from any Indian, excepting for (an) on account of the United States. And any person offending herein shall forfeit a sum not exceeding one thousand dollars and be imprisoned not exceeding twelve months."

It clearly appears from this legislation that a license to trade with the Indians did not authorize the person so licensed to purchase a horse from them nor did the punishment for trading with the Indians without a license have anything to do with the punishment provided for a person who should purchase a horse without a license therefor. It also appears that Congress thought it necessary in prohibiting clerks and other employees from being interested in any trade with the Indians to also specifically to prohibit them from having any interest or concern in the purchase of horses from any Indian, thus clearly carrying out the idea and intention of Congress that trade with the Indians was a separate and distinct matter from that of purchasing from the Indians horses or the other articles mentioned in Section 9.

The Act of March 30, 1802, 2 Stat. 139, entitled 'An Act to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontiers,' by Sections 9 and 10 thereof prohibited the purchase or receipt by any person from an Indian, in the way of trade

or barter, a gun and other articles, under a penalty of fifty
218 dollars and imprisonment not exceeding thirty days, and also the purchase of any horse of an Indian without a license therefor under a penalty of one hundred dollars and imprisonment not exceeding thirty days.

Section 11 of the same Act provided as follows:

"That no agent, superintendent or other person authorized to grant a license to trade or purchase horses shall have any interest or concern in any trade with an Indian or in the purchase or sale

of any horse to or from any Indian excepting for and on account of the United States, and any person offending herein shall forfeit a sum not exceeding one thousand dollars and be imprisoned not exceeding twelve months.'

It will thus be seen that the idea of trade with the Indians and purchasing horses and guns and other articles are treated separately and punished differently, and, so far as the intention of the Legislature can be gathered from the language used, it must be held that trade with the Indians within the meaning of the legislation of Congress never was intended to cover purchases of property from them standing alone.

The Act of April 21, 1806, entitled an 'Act for establishing trading houses with the Indian tribes,' 2 Stat. 402, provided for the establishing of trading houses by the President and also the appointment by him of a superintendent of Indian trade, whose duty it should be to purchase and take charge of all goods intended for trade with the Indian nations and transmit the same to such places as should be directed by the President. By Section 2 of said Act said superintendent of Indian trade was required to take an oath that he would not directly or indirectly be concerned or interested in any trade, commerce or barter, but on the public account. By Section 6 of the same Act it was provided that the superintendent of Indian trade, the Indian agents, their clerks or other persons employed by them, should not be directly or indirectly interested in carrying on the business of trade or commerce with the Indians on their own or any other than the public account. It was also provided that if any such person should offend against said prohibition he should be deemed guilty of a misdemeanor and should upon conviction thereof forfeit to the United States a sum not exceeding one thousand dollars and should be removed from office. By Section 11 of the same Act it was provided that if any agent or agents, their clerks or other persons employed by them, should purchase or receive from any Indian, in the way of trade or barter, any gun or other article commonly used in hunting, any instrument of husbandry or cooking utensil of the kind usually obtained by Indians in their intercourse with white people, or any article of anything excepting skins or furs, he or they should respectively forfeit the sum of one hundred dollars.

The Act of March 2, 1811, 2 Stat. 652, entitled 'An Act for establishing trading houses with the Indian tribes,' provided that the superintendent of Indian trade, the agents or their clerks or other persons employed by them should not be directly or indirectly concerned or interested in carrying on trade or commerce in any of the goods or articles bought for or supplied to or received from the Indians, and that if any such person should offend against any of said prohibitions, he should be deemed guilty of a misdemeanor, and upon conviction thereof should forfeit to the United States a sum not exceeding one thousand dollars, and should be removed from office. Section 8 of the same Act re-enacted Section 11 of the Act of April 21, 1806.

We now come to the Act of June 30, 1834, entitled 'An Act to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontiers.' Section 7 of this Act is the same as Section 2135 of the Revised Statutes of the United States. There were two Acts of Congress passed on June 30, 1834. The other Act was entitled 'An Act to provide for the organization of the Department of Indian Affairs,' and it is Section 14 of the last named Act which was substantially carried into the Revised Statutes of the United States as Section 2078 thereof. Nothing appears in the Revised Statutes of the United States to show that trade with the Indians should mean anything different from what those words had always meant in the legislation of Congress, and it appears conclusively to the court that those words always (referred) to the trade or business which the United States authorized by issuing a license to certain persons for exercising that trade or business and that said words never did refer to the purchase of cattle or horses from the Indians.

So far as the investigation made by the court has gone, Congress never did prohibit the purchase of cattle from the Indians until the Act of July 4, 1884, 23 Stat. 94, and that law is confined to so-called issue cattle. It may be that it would be wise to prohibit the purchase of cattle from Indians by persons employed in Indian affairs, but the court cannot supply needed legislation by construction of present laws. There is no doubt in the mind of the court but that the defendant upon the facts proven did not have any interest or concern in any trade with the Indians within the meaning of Section 2078, R. S. U. S., but if the court had a doubt about the true construction of said section under well recognized rules it is bound to resolve that doubt in favor of the defendant. Judgment will therefore be entered in her favor."

That if Section 2078 does not even include the purchase of horses and cattle, certainly it does not include the purchase of an allotment as to which there was not even a hint in those statutes.

221

II.

The court erred in not holding that 2078 does not apply to real estate transactions. And it further erred in not holding that in any event it does not now so apply.

It is obvious, aside from the fact that in those early times Indians held no real estate in severalty, and but few, if any, tribes held the fee, that Congress was not in those statutes dealing with sales of real estate, with their attendant solemnities and notoriety, but with such trade as passed physically from hand to hand with its inherent lack of protection. Had it been dealing with real estate, it would not require such formal and solemn methods as it afterwards adopted when that exigency arose.

The transaction at bar was approved by the superintendent of the agency and the Secretary of the Interior, so that in the last analysis

It was impossible to have wielded any influence over the vendors. Those officials were the guardians of the Indians, and the result of the opinion is to say that the influence was wielded over them, which, of course, the Court does not really intend; however, these safeguards reject the criterion of which the opinion may be susceptible, that the vendee must be in a position to exert influence which, in any event, we shall show is incorrect. But a more serious question is this: While the word "trade" may normally embrace a real estate transaction, the Act of 1834 was enacted at a time when Indian lands could not be sold; in fact, at that time no allotments in severalty had been made. The first Act which looked to severalty holdings was the General Allotment Act of 1887. The prohibitive Act carried into the revision of 1875 made no provision for approval of a sale or trade with an Indian by the class of persons proscribed; they prohibited it. But with the allotments in severalty there came a policy which is well known to this Court: That of permitting the sale of allotments under certain conditions, of which inherited land is one, provided it is done in a certain manner and that the deed is approved by the Secretary of the Interior. This, of course, relates only to allotments of land, and the conditions so laid down must be assumed to have been sufficient in the mind of Congress to safeguard the Indian, even from influence of Indian office employees. And as the Court knows, and as Congress presumptively knew, special legislation repeals general legislation so far as it affects the subject matter of the later and special provisions. Hence, although this transaction might have been within the meaning of Section 2078 before the special provisions relating to the sale of allotments, it must be assumed that when Congress provided safeguards and conditions under which the land could be sold, it did not intend to exclude as lawful vendees the persons referred to in Section 2078; otherwise it certainly would have so said. And it is clear that it relied upon the Secretary to see that the deed was fair on all respects, because of the plenary power which it gave him, which, because of its plenary character, possessed preventive and therefore even greater prohibitive force than that afforded by Section 2078.

If it be said that the foregoing view means that employees of the Office of Indian Affairs may purchase allotments provided the Secretary approves the transaction, we reply: (a) Congress said nothing to the contrary in providing elaborate safeguards for their sale. (b) That because the power of approval of the Secretary is plenary and arbitrary, limited in no manner whatever by Congress, it is quite plain that that question was one which was left to his discretion.

And that this discretion was exercised to its utmost against officers and employees of the Indian Office, see letter of Commissioner Valentine (R. 50):

"The Indian Office has prohibited any of its employees from purchasing Indian lands" (citing an order issued by the office).

What was the necessity for an administrative prohibition of the department, which must be presumed to know the Revised Statutes

covering its affairs, believed 2078 applied to sales of allotments, with its penalty of dismissal? In that very letter Mr. Valentine says:

"Mr. Ewert acted within the law and there is no suspicion of fraud."

And the review of legislation by Judge Carland quite plainly shows that 2078 was passed only with goods and supplies in view for no provision was made for the sale of real estate to Indians by the licensed traders and agents of the Government, nor was it being sold to them "for or on the public account."

III.

The Court's opinion contains a fundamental error in assuming that appellee was an "officer of the Indian Department" when in truth he was in the service of the Department of Justice.

With due respect for the Court, appellee is at a loss to understand why the opinion refers to him as an employee or officer of the "Indian Department." In the first place, there is now no such thing as the "Indian Department." The "Office of Indian Affairs" is the title now conceded to the bureau of the Interior Department 224 having charge of Indian matters and is the title appearing on its papers. (R. 50.)

The record shows that appellee was appointed by the Attorney General, and that officer, as the Court, of course, knows, is the head of the Department of Justice. Appellee was employed under such statutes authorizing the Attorney General to employ attorneys and counsels at law. He was paid out of an appropriation to the Department of Justice each year a lump sum appropriation; e. g., see 36 Stats., Pt. 1, p. 750, par. 3, devoted exclusively to such employment.

This reference is to the Appropriation Act in force at the time the deed was taken in 1909, and is as follows:

"For payment of special assistants to the Attorney General and to United States district attorneys employed by the Attorney General to aid in special cases, \$175,000. This appropriation shall be available also for the payment of foreign counsel employed by the Attorney General in special cases."

And this Act is repeated from year to year.

Appellee was therefore under the direction and control of no one but the Attorney General, and fails to understand upon what theory the honorable Court refers to and considers him "an employee of the Indian Department." Surely not because he was engaged in a class of litigation which might be denominated broadly as "Indian," for in truth the officers and employees of the Department of Justice are engaged in no litigation which does not arise out of the work of one of the several executive departments. The functions of the Department of Justice inherently give rise to no litigation. What, then, is the result of this assumption by the honorable Court? That the

officers and employees appointed under the Department of Justice are officers and employees of the particular department wherein arose the litigation upon which they happen to be engaged, a conclusion which appellee thinks the honorable Court will speedily disavow, for the havoc which such a holding would do to plainly work would be unending.

In referring to the class of persons affected, the opinion uses interchangeably the terms "employed in Indian affairs" and "employed in the Indian Department." That this is entirely sound is seen by Section 14 of the Act of 1834, from which Section 2078 was taken, which confines the class so affected to persons employed in the "Indian Department." And appellee hopes he does not assume too much in considering that interchange a judicial determination that those only are within Section 2078 who are the Indian "Department," or what was meant by that term in the statute of 1834. See *post*.

We are not, of course, dealing with the mere generality of the dictionary meaning of the term "affairs," but with the grave concern now Congress used the term "Indian affairs" in 2078 in expressing a class of persons which it intended to affect by a highly penal statute, and if the Court intended to say that the two terms which it uses are equal in scope, then it intended to say that the statute is confined to persons employed in what is now the Office of Indian Affairs, of which appellee plainly is not one, and therefore the decree must go against him.

And it is vital here to say that a statute of a given character is susceptible of but one rule of construction, whether the proceedings be by way of indictment or of civil relief, and even if this case were not equal in character, seeking, as it does, to cause appellee to forfeit his franchise, the statute itself is penal and therefore subject to strict construction. There is, of course, no such thing as both a broad and a strict construction of the same statute.

That all officers of Indian affairs conceded appellee was not in that service, see letter of Valentine (R. 50); letter of Secretary Fisher (R. 63); letter of Assistant Secretary Pierce (R.

But should there be any inclination by the Court to say that the opinion means that the statute applies to all persons in the Government service who may perform work which in any way touches an Indian, regardless of the department or bureau by or in which they may be so employed, we proceed to show that the statute distinctly does not so apply.

IV-A.

Section 2078 of the Revised Statutes applies only to persons employed in and under the control of the Office of Indian Affairs, which is under the jurisdiction of the Interior Department, of which appellee indisputably was not one, and does not apply to persons employed in and under the control of other departments of the Government. This is a controlling question and the Court's opinion does not decide it.

Under this head it is respectfully submitted that the Court seems to have been guided somewhat by its sense of economy. We think the case is susceptible of certain wholesome principles of statutory interpretation which have become almost as fixed in their operation as the laws which govern the planets. As said by the eminent Judge Carland in the Douglass case:

"It may be that it would be wise to prohibit the purchase of cattle from Indians by persons employed in Indian affairs, but the court cannot supply needed legislation by construction of present laws."

- 227 But it will be shown hereinafter that to extend the statute beyond employees of the Indian Office by legislation would be impracticable.

It is true, the two cases do not present the same question and that the appellate court differed with Judge Carland on the construction of 2078 as bearing on that case, but the principle of the above utterance is applicable here and is one of the cornerstones of American jurisprudence; one of the pillars, indeed, upon which our government structure rests, sustaining the independent action of the three branches. The opinion does not show that appellee was "a person employed in Indian affairs"; it assumes it, as does the opposing brief. It is admitted that appellee's brief is deficient in this respect. It may be, indeed, that he is responsible; but so far from excluding him from rehearing on that account, it is one of the very reasons for the exercise of that wise and just instrumentality. It may be assumed, indeed, that it is the chief reason, since the office of the attorney is to relieve the court of the stupendous task of research, as far as that may be done by the knowledge, industry and resource of the former.

That appellee was not such a person is shown by the fact that

The term "employed in Indian affairs" in the statute indisputably means "employed in the Office of Indian Affairs."

In construing any part of the United States Revised Statutes it is admissible and often necessary to recur to its connection in the Act of which it originally was a part.

U. S. v. Hirsch, 196 U. S. 1.

U. S. v. Bowen, 100 U. S. 508.

Victor v. Arthur, 104 U. S. 498.

- 228 If there be any ambiguity in a section of the Revised Statutes, resort may be had to the original statute from which the section was taken to ascertain from the language and context to what class of cases the language was intended to apply.

The Conqueror v. Stevenson, 215 U. S. 190.

The history of prior legislation upon the same subject may be considered in determining the intention of Congress in passing a law.

U. S. v. Stevenson, 215 U. S. 190.

On July 9, 1832 (4 Stat. 564), Congress provided as follows:

The President shall appoint, by and with the advice and consent of the Senate, a Commissioner of Indian Affairs, who shall, under the direction of the Secretary of War, have management of Indian affairs and all matters arising out of Indian relations."

On June 30, 1834 (4 Stat. 738), Congress passed an Act entitled: "An Act to provide for the organization of the Department of Indian Affairs."

Every section of that Act is, of course, devoted to what its title lies, and nothing else. It provides for "Superintendents of Indian Affairs" and other officers and employees under a specific bureau for the conduct of such work, which was then under the control of the Secretary of War. Section 14 of that Act provides:

"That no person employed in the Indian Department shall have any interest in any trade with the Indians except for the account of the United States; and any person offending therein shall forfeit the sum of five thousand dollars, and upon satisfactory information of such offense laid before the President of the United States, it shall become his duty to remove such person from the office or situation which he may hold."

If we were to stop at this statute we would most certainly be limited to a person "employed in the Indian Department," or its equivalent, and by no stretch could its provisions be extended to the other departments or bureaus of the Government; otherwise there would have been no reason for the limitation of the Indian Department.

Section 462, Revised Statutes, provides:

"There shall be in the Department of the Interior a Commissioner of Indian Affairs, who shall be appointed," etc.

Section 463:

"The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of Indian affairs and matters arising out of Indian relations."

When the Revised Statutes were adopted, the term "Department" was dropped from the Act of 1834 (see Section 2078) evidently because the term was incongruous and incorrect as applied to any less than the units of the executive branch presided over by a member of the cabinet. In *U. S. v. Germaine*, 99 U. S. 510-511, the Supreme Court said this very thing of the term as used in the Constitution and said that the heads of departments were necessarily

something different from the inferior commissioners and bureau chiefs, who are themselves mere aids and subordinates of the heads of departments."

And the court said that it means only such as the "Treasury Department," "Department of Justice," etc. From the first Revised Statutes, which was in 1875, down to the present time, the word has not been used in the laws of Congress in any other manner. And it may well be doubted that Congress ever used the word in any other sense except in the Act of 1834. The abandonment of the word as to Indian affairs has been followed by a departmental use of the term, "Office of Indian Affairs" (R., p. 50). And although the term "Office" does not seem to have been commended by Congress, it recognized the use of it in one instance (9 Stats. 587, Sec. 9), where it appropriates for a "chief clerk in the Office of Indian Affairs" (Act Feb. 27, 1851). Since the Act of 1834 the word "department" has not once been used legislatively as to Indian affairs. It has been so used in indices to legislation, which is done by a clerk in the State Department, but that use is purely clerical and as to Indian affairs is evidently a relic of the Act of 1834.

But the term "Indian affairs" has been consistently used in referring to that bureau from the beginning of the government, as the yearly appropriations and other legislation will show, using the words in connection with "department" in the title of the Act of 1834, but never thereafter (and never before, apparently).
 231 with the word "Office" in the Act of 1852, and the term
 "Indian affairs" alone in many others, including Section
 2078.

The caption under the title "Indians," XXVIII, R. S., is as follows:

"Officers of Indian Affairs; Their Duties and Compensation."

And then follow Sections 2039 to 2078, which codify, among others, the statutes reviewed by Judge Carland. And the commissioners appointed "to revise and consolidate the permanent laws of the United States" declare by the marginal note that they took 2078 from Section 14 of the Act of 1834, the title and scope of which have been given above. The title of that Act followed the words "Indian affairs," which had consistently been given to the bureau, its agents and superintendents, and then to the commissioner in 1832. Of course, the title of an Act may be referred to. 164 U. S. 526; 178 U. S. 41.

Could anything be plainer than that the Act of 1834 was carried into 2078 as applying to a "person employed in Indian affairs" in exactly the same sense as it had originally been applied to "a person employed in the Indian Department" in the Act of 1834, with its consequently plain limitation to persons employed in that "department" or bureau? That was a change in the statute as codified, and the question for the Court is whether it was to create a new class of people to be penalized or was merely to abandon the word "department" as applied to that bureau and to substitute the word "affairs" to make the section consist with the descriptive words in the title of the Act of 1834, even following capitalization, and that of the commissioner and other officers as commanded in the organic

ts. The word "office" had not been commanded, which explains why the codifiers did not use it.

32 And the vital point here is this: That Congress intended no substantial change in compiling the Revised Statutes. In *Urduock v. Memphis*, 20 Wall. 617, it is said:

"This view is strongly supported by the consideration that the revision of laws of Congress passed at the last session (referring to the first revision), based upon the idea that no change in existing law should be made, has incorporated with the Revised statutes nothing but the second section of the Act of 1867."

This refers to the claim that an Act passed prior to December 1873, amended Section 2 of the Act of 1867, to which the court is referring. December 1, 1873, marked the date as to which the statutes were codified, which means, as the Court knows, that the Revised Statutes are the law as it existed on that date without change.

"It was the declared purpose of Congress to collate all statutes they were on that date and not to make any changes in their provisions."

Smythe v. Fisk, 23 Wall. 382 (referring to Dec. 1, 1873).

"The Revised Statutes must be accepted as the law on the subjects which were embraced as it existed on December 1, 1873."

U. S. v. Bowen, 100 U. S. 508.

Cambria Iron Co. v. Ashburn, 118 U. S. 57.

U. S. v. Auffmordt, 122 U. S. 209.

If the language of the Revised Statutes is doubtful, reference may be had to the original statute.

Deffelback v. Hawke, 115 U. S. 402.

U. S. v. Stevenson, 215 U. S. 190.

3 So that the court is bound by the law as it was on December 1, 1873, with liberty to refer to that law to clear a doubt in the revision. And under general principles it is well settled that in a revision or consolidation no change is intended less it is clearly expressed.

U. S. v. Le Bris, 121 U. S. 278.

Anderson v. Pac. Coast S. S. Co., 225 U. S. 199.

Logan v. U. S., 144 U. S. 263.

U. S. v. Mason, 218 U. S. 199.

Potter v. Bank, 102 U. S. 163.

McDonald v. Hovey, 110 U. S. 619.

In *U. S. v. Ryder*, 110 U. S. 729, 740, the court says:

"The revisioners would not have proposed, nor would Congress have made, such a fundamental change in the law as the extension of these provisions to criminal cases without employing more proper means for that purpose than this section contains. It will not be

inferred that the Legislature, in revising and consolidating laws, intended to change their policy unless such intention be clearly expressed."

The Court seems to have waived, in the above case, the fact that no substantial change at all was intended by the revision. If that was not absolute, the presumption at least is certainly to that effect. However, we waive for the moment the same fact and ask: Is it clearly manifested that Congress, in 2078, intended to extend the Act of 1834 beyond the limits to which it had been so naturally confined? Is it clearly manifested that in the numerous and complex relations between the various departments Congress intended that every person in every department who should touch a class

234 of work, or even one matter, for the statute makes no difference, which could be termed "Indian," would be the subject of a highly penal statute; or is it clearly manifest, at least is it not probable, that all it did was to abandon the word "department" for the reasons stated? And even if it were not apparent, the reason is something with which the court need not concern itself, since it is bound by the rule laid down by the Supreme Court in the *Ryder* case. And is not the latter the correct view when we look at Title XXVIII and see that it is the organic act of the bureau presided over by the Commissioner of Indian Affairs and that every section in it, from 2039 to 2077, is devoted to the duties and conduct of officers and agents subject to the appointment, control and direction of the Commissioner of Indian Affairs, acting under the Secretary of the Interior? And is it not beyond peradventure that 2078 refers only to the personnel of that organization?

To show Your Honors the extent to which this implied subjection to a high penalty would go, a clerk in the auditor's office of the Treasury Department employed to adjust Indian accounts is as much within its provisions as an attorney employed by the Department of Justice to cancel some deeds to Indian lands unlawfully made by a marshal, which is the case at bar. An employee of the Department of Agriculture who prepares bulletins as to whether the Indians can raise cotton on their lands is in the same category; so is a geologist of the geological survey, a bureau of the Interior Department, who examines Indian lands that the Indians may know its mineral value. Examples without end could be mentioned. There is not another bureau or department of the Government mentioned in the Revised Statutes whose title contains

235 the word "affairs," or which is even referred to by that word. yet opposing counsel would have the Court believe that the term was a mere dictionary use.

IV-B.

Either the employees of every department of the Government come within the Court's decision or that decision should be reversed.

This is true because a line cannot be drawn except at the Office of Indian Affairs. Where else can it be drawn? Is the Department of Justice the one other department to be subjected to the same? If so, upon what is the distinction founded? To show Your Honors that Congress would have specified the other department if it so intended, Your Honors are respectfully referred to Supp. S., Vol. 1, p. 67, Sec. 10, which is as follows:

That no agent or employee of the United States Government, any of the executive departments thereof, while in the service of the Government, shall have any interest, directly or indirectly, contingent or absolute, near or remote, in any contract made, or in any negotiation, with the Government, or with the Indians, for the purchase or transportation or delivery of any goods or supplies to the Indians, or for the removal of Indians" (prescribing penalties, etc.).

Here is the deadly parallel. We need not stop to consider reasons for the distinction between this Act and 2078. We are not permitted to do so because the statute is plain, and it shows that when Congress means to subject the personnel of the whole Government of the United States to a prohibition or a penalty, it says so. It does not, when it so intends, speak of persons "employed in Indian affairs" or "naval matters" or "pension matters" or "public land matters." It could not do otherwise knowing, as it does, that the American system of jurisprudence, as built up and nurtured by the great American jurists, defends the right of a given person to be exempt from a penalty unless Congress has unmistakably said he should be otherwise.

IV-C.

The statute either embraces all persons in the Government or is confined to those in the Office of Indian Affairs. There is no middle ground; therefore the criterion of influence over the Indians, merely because of the position held by appellee, is not sound.

The alternative stated in the caption is squarely before the Court. We assume the Court has held the first view, and we have shown, we think, that the view is not what Congress intended. If Your Honors do not intend to say that Section 2078 added to the Act of 1834 applies to all persons in the Government service whose work might touch Indian affairs, then Your Honors necessarily say that it applies to all persons whose position is such as to "wield an influence" and that appellee is in the class, not merely because he was engaged in work which might be denominated "Indian" work, but upon the theory that the employment to set aside some deeds to Indian lands lawfully made by a marshal was such as to control the will of the Indian in selling his inherited land through the agent and the Secretary of the Interior. But the statute makes no such thing the criterion. Its gravamen are but two: A trade with an Indian, and that the trade is made by a person employed in Indian affairs. And

the criterion set up by the Court invariably means judicial legislation, because what does or does not involve the wielding of influence is purely a matter of economic sense, which of course, is highly elastic and depends entirely upon the particular judge before whom the case may come. Congress made no such delegation by the statute, and if it did it would not be constitutional.

It is respectfully insisted that Congress meant one of two things and nothing more: That the statute applies to all persons in the Government service whose services might touch an Indian, or it meant to confine Section 2078, as did the Act of 1834, to persons in what it organically made the Office of Indian Affairs. If the latter, the decree must in any event go for appellee.

In truth, every department has one or more statutes prohibiting its employees and officers from transactions within that department; and they are in terms limited to such officers and employees. The reason for such statutes is not that the employee wields an influence over the persons engaged in the transaction, but that it gives opportunity for use of information obtained through close official connection with that particular department. That class of statutes is in truth confined to employees of the bureau having charge of the subject matter. See the Treasury Statute on page 124, appellee's brief; and the Public Land Statute, Section 452, R. S.:

"The officers, clerks and employees in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any public land; any person who violates this section shall forthwith be removed from office."

See Patent Office Statute, 480, R. S.: and Pension Office, 5480, R. S. These three last, with the Office of Indian Affairs, are the main bureaus of the Interior Department, and we think the Court will now see that the four sections are equal in scope. At all events,

if Congress intends anything else, it says so, as in the Act of 1834, (Supp. R. S., Vol 1, p. 67, Sec. 10) hereinbefore quoted.

And it said so there in unmistakable terms, without which the Court may not inflict a penalty, we respectfully submit. Of course, there is the general statute which prohibits all officers and employees from prosecuting cases or claims against the United States, but that has no reference to the matters before any particular department. Sec. 1782, R. S.

Section 2078 may have been based upon the idea of influence over Indians, but it yields more readily to the conviction that employees of Indian affairs could know in advance of the payment of annuities, etc., to Indians and thus take advantage of their improvidence, besides overreaching the Government in its plain purpose to provide a means of confiding trade with its wards to itself.

IV-D.

Even if the foregoing review does not convince the Court of the limitation of the statute to the Office of Indian Affairs, it fairly must create a doubt, which should have been resolved in favor of appellee.

It scarcely is necessary to say to this Court that a penal statute must be strictly construed; *Bolles v. Outing Co.*, 175 U. S. 262. Any doubt as to such statute must be resolved in favor of defendant; *S. v. Sheldon*, 2 Wheat. 119. No one can be punished for violation of a statute unless plainly and unmistakably within its terms; *S. v. Lacher*, 134 U. S. 624.

And in *Keitel v. U. S.*, 211 U. S. 370, 395, the Supreme Court condemns any construction of an amendment which by implication adds to an existing penal statute a class of offense- or of persons not within the original Act if susceptible of any other purpose. And that is exactly what was done, for the effect of the opinion is to say that 2078 added to the Act of 1834, which in terms is limited to the "Department" of Indian Affairs, a class of persons by implication, that is, persons not in the department or office of Indian Affairs, for, as has been herein said, an appointee of the Department of Justice is assuredly not a person employed "in the Department of Indian Affairs." In the *Keitel* case the original statute was Section 4746, R. S., which punishes the "making of a false or fraudulent affidavit concerning any claim for pension or bounty land or the employment thereof, or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions." An amendment of July 7, 1898, added to the section the words "or the Secretary of the Interior." By the Government it was contended that under the amendment an indictment lay for a false affidavit before the Secretary of the Interior in making of a coal-land entry because the amendment was sweeping in its terms and embraced every matter within the jurisdiction of the Secretary. By the defendant it was said that the amendment was because of the underlying control of the Secretary over pension and land bounty claims and the resultant fact that such matters might come before him as well as the subordinate Commissioner of Pensions, and that without a manifest intention by Congress, clearly expressed, that a new class of offenses was to be added to a penal statute, that construction should prevail. Said Mr. Chief Justice White:

"It was said by the United States in argument, and it could not have been in reason denied, that the section in question as originally embodied under the head of 'Pensions' in the Revised Statutes, related exclusively to pension on bounty land claims. No crime, therefore, could have been predicted under the original section upon the affidavits and other papers used in making coal land entries as alleged in the indictment. * * * The argument as to the broad scope of the statute in its present form rests, therefore, upon the proposition that because the amendatory statute, in repeating the original words (quoting the material portion of Section 4746), adds to them the following, viz.: 'or of the Secretary of the Interior; therefore the statute now embraces not only those done in connection with pension or bounty claims, but all acts of the prohibited character as to any matter coming before the Secretary of the Interior or subject to so come, entirely without reference whether they were in pension or bounty claim proceedings. But

to adopt this latitudinarian construction would cause the statute to create a multitude of new and substantive crimes. * * * When the original text and the amendment are taken into consideration the conclusion becomes inevitable that the purpose of the amendment was to more fully deal with the subjects with which the provision which was amended dealt."

Thus, the court rejected the contention that the amendment added, without clear words to that effect and because another ground could be found, a new class of Acts subject to penalty. Here the court, it is thought, has added to the original statute a new class of persons subject to the penalty, evidently on the theory that Congress impliedly intended that addition by revision into Section 2078, when the only change made is the dropping of the word "department," which was necessary because, as shown by the revision throughout, the executive branch had become organized into well-defined units, to be known as "departments," each presided over by a member of

the Cabinet. So the addition of this new class of persons.
241 which the decision at bar unquestionably means, is, it seems to counsel, much more violent even than the Keitel case.

If this rule applies with such vigor to an ordinary amendment, with how much greater force must it apply to a codification and revision by commissioners?

V.

The Court erred in not holding that the approval by the Secretary, the Attorney General and the Commissioner were departmental constructions in appellee's favor of all controlling statutes, and in not following that construction.

Certainly the Court will not assume that the Secretary, the Commissioner, and the Attorney General, surrounded as they are by a corps of trained lawyers, and Secretary Fisher, at least, was of the same training, did not look carefully to the legality of the transaction. We are not contending, as the opposing brief would have the Court believe, that these approvals gave validity to an invalid transaction. We say that these approvals were necessarily a departmental construction of all controlling statutes, first by the very department having jurisdiction over the subject matter and then by the highest law officer of the government. Authorities need not be extensively quoted, for the learned judge who wrote the opinion at bar is himself authority for the principle. *Blanset v. Cardin et al.*, 261 Fed. 309. And to this we add: *Studebaker v. Perry*, 184 U. S. 258, in case of doubt. And that the ruling should not be overturned without cogent reasons: *U. S. v. Johnston*, 124 U. S. 236; *Heath v. Wallace*, 138 U. S. 573; and that they are entitled to great respect and are ordinarily controlling: *Penoyer v. McConaughy*, 140 U. S. 1; *Robertson v. Downing*, 127 U. S. 607; *U. S. v. Healy*, 160 U. S. 136.

242 Both the Attorney General (p. 75) and the Secretary of the Interior (p. 76) declared the transaction to be "legal";

and both officers must have construed this very section, for the Secretary declared:

"Mr. Ewert is not an 'employee of the Indian Office,' and in strictness was within his legal rights." (R., p. 76.)

Attorney General Wickersham said:

"I saw no legal reason why he should not purchase the land." (R., p. 75.)

Acting Attorney General Ellis said appellee was "free from any offense." (p. 80.)

And the Commissioner of Indian Affairs says:

"The case has been carefully investigated and it appears that Ewert acted within the law and there is no fraud." (R., p. 75.)

VI.

The Court erred in not holding that special assistants to the Attorney General are not within the statutes restricting Government employees in professional or commercial matters.

Attorneys so employed are in the same category as a painter or a builder or any other person employed to do a specific piece of work. The Attorney General holds that they are not subject to 1782 R. S. Certified copies of the opinions which follow have been filed with the clerk:

243

"May 8, 1907.

Charles R. Bosworth, Esq.,
Ernest and Cramer Building,
Denver, Colorado.

SIR:

Answer to your letters of April 9 and 24 in relation to the execution of the oath of office under your appointment as Special Assistant to the United States Attorney for the District of Colorado has been unavoidably delayed.

Therein you state that under this appointment you are to aid in a suit to be brought by the Orlando Canal and Reservoir Company, in the name of the United States, to secure the forfeiture of grant of right of way acquired by the Pope and Shoman Reservoir, and ask whether the fact of your being attorney for the Orlando Canal and Reservoir Company would in any way disqualify you from acting as Special Assistant to the United States Attorney by virtue of anything contained in Section 1782 of the Revised Statutes. While the Attorney General is not authorized to give an official opinion upon a question of law unless it is submitted by the President or by the head of an Executive Department, nevertheless it seems proper, under the circumstances of the case, for your guidance in connection

with the appointment which you have received, to answer the question submitted.

In response, therefore, I beg to say that the practice of the Department for many years has been to regard attorneys who have been employed specially in some particular case as not being within the language of the section referred to; and, furthermore, that that section, by its language, of course has no application to cases pending in any court. Your question is therefore answered in the negative.

Respectfully,

(Signed)

CHARLES J. BONAPARTE,
Attorney General.

244

"December 28, 1914.

Robert W. Childs, Esq.,
Special Assistant to the Attorney General,
New York Life Building,
Chicago, Illinois.

SIR:

I acknowledge receipt of your letter of the twenty-sixth instant wherein you ask whether your acceptance of special employment as a Special Assistant to the Attorney General to render service in trial of specified cases pending in various United States District Courts, and involving the prosecution of criminal charges growing out of the alleged violation of oleomargarine laws, would bring you within the operation of Sec. 113 of the Penal Code of 1910.

I am of the opinion that it would not; and for these reasons:

The fact that you make an oath upon appointment is not necessarily determinative of the question. 17 Ops. 419. The statute, being penal, must be strictly construed. The only word therein which could be claimed as applicable to you is the word 'officer' and because there is in your employment neither duration and continuance of duties, nor duration and continuance of term, you would not be regarded as an officer within either the spirit or the letter of this statute. 2 Comp. Dec. 271; 26 Ops. 247; United States v. Hartwell, 6 Wall. 385; United States v. Germaine, 99 U. S. 508, 511.

Respectfully,

(Signed)

T. W. GREGORY,
Attorney General.

Section 1782 (113 Penal Code 1910) is as follows:

"No senator, representative or delegate, after his election and during his continuance in office, and no head of a department or other officer or clerk in the employ of the government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered or to be rendered, to any person, either by himself or another, in relation to any proceedings, contract, claim, controversy, charge, accusation, arrest, or any other matter or thing in which the United States is a party

directly or indirectly interested, before any department, court-martial, bureau officer, or any civil, military or naval commission whatever" (providing penalty).

Special assistants are a means provided by Congress for meeting emergencies in the service which cannot always be foreseen. And even if foreseen they are of such a character, because they are emergencies, as not to warrant a recurring and individual annual appropriation, such as is made for the regular and permanent staff. They may be employed for one day or indefinitely, in one kind of service or another. Their compensation is wholly a matter for the Attorney General. Their services not only terminate at his pleasure, but with the conclusion or suspension of the particular work for which they are employed.

Because of these characteristics, which place them upon a plane with other persons who are sporadically and ephemerally employed by the heads of departments to perform various kinds of service, commonly called "piece work," these attorneys are held not to come within the various statutes, which, for one reason or another, restrict officers and employees in commercial transactions and private services. And the reasons are quite obvious: On the one hand an impairment of the service by the prohibited acts could not well be predicated of the fleeting and precarious duration of their services. On the other, it would often be difficult to secure the acceptance of such services if Congress were so to restrict them, for the gain would often not compensate for the restraints.

246 So we find the highest law officer of the government declaring that persons in the exact category of the defendant are immune from these restrictions. And this declaration must apply to all restrictive statutes, for the appropriation does nothing but appropriate; it contains no other language and, therefore, is not susceptible of any distinctions as to duration, compensation, or, what is of more importance, character of services or of immunities. Indeed, the very statute to which their opinions are addressed, 1782, is so broad as to embrace every possible kind of a proceeding before the government, yet these opinions make no distinctions in that behalf, and are unlimited in their scope.

If a special assistant is not in the "employ of the government" (1782) how can it be said that he is "employed in Indian Affairs" (2078)? And it will be remembered that these opinions are necessarily a construction of the Act under which appellee was employed.

Section 1782 does not include the precise inhibition of 2078, for the gravamen are different, the one a trade, the other the "reception of compensation," yet a controlling element in both is employment in the government service, and 1782 necessarily includes 2078, since the very life of the latter depends upon a governmental interest—the guardianship over Indians. And the transaction at bar was one clearly within 1782 also because it was a matter before the Interior Department, requiring by law its approval. And to show that the element of governmental interest is controlling as to both statutes, the attorney or agent in a transaction like that at bar would come

within 1782, while for the same reason the principal would come within 2078, assuming, of course, that both he and his transaction are within the purview of that section.

No distinction can be claimed as between one kind of restriction and another, because, as has been said, the statute is not susceptible of it. The character of the restrictions in the case cited by Attorney General Gregory vary greatly, and neither his opinion nor those cases make any distinction in that behalf, but are based upon the general ground that services by such persons are not sufficient to make them employees or officers of the government within restrictions based on that element. In 26 Opinions of the Attorney General 247, will be found an exhaustive opinion which holds that employment out of a fund for temporary services, as is the case of employment of attorneys as special counsel by the Attorney General, is an employment temporary in character; that Congress does not create any office for its application, nor recognize the employment as an office, and consequently the Commissioner of Labor was permitted to take such employment contemporaneously with his regular and permanent office without being subject to statutes prohibiting holding two offices over a given salary.

And in that opinion is reviewed the case of U. S. V. Germaine, 99 U. S. 508, which was an indictment of a contract surgeon in the Pension Office, who was employed by that office under Section 477, R. S., authorizing the Commissioner to

"appoint, at his discretion, civil surgeons to make periodical examinations of pensioners and to examine applicants for pensions,"

and ap-propriating for the employment. The indictment was under Section 12 of the Act of 1825 (4 Stats. 118):

"Every officer of the United States who is guilty of extortion under the color of his office, shall be punished by a fine of," etc., etc.

248 It is true the court's opinion revolves around who is an "officer" of the United States, but that was because of the exclusive use of that word in the statute. The principle of the decision which holds the surgeon not subject to such a penalty because of the manner in which Congress authorized his employment, is applicable and controlling here, for the statute there is identical in character with the authority to the Attorney General to employ attorneys at law under the title of special assistants, either to himself or to United States Attorneys. Of course, the rationale of this decision applies to the word "employed" in 2078. Said the court at p. 511:

"No regular appropriation is made to pay his compensation. * * * He is but an agent of the commissioner, appointed by him, removable by him at his pleasure. * * * He may appoint one or a dozen persons to do the same thing."

The Court knows, out of its large experience, that this appropriation for special assistants is designed to meet such exigencies as

which the United States Attorney or other officer of the Department is disqualified, or because of temporary pressure of work on the officers, or because the attorney so engaged is peculiarly fitted for the particular work, which is always ephemeral in character. If the Court will kindly turn to the case of *U. S. v. Rosenthal*, 121 Fed. it will find a full discussion of the nature, rights and liabilities of employment under this appropriation which will, we think, convince the Court of the position taken herein. And a more exhaustive discussion of the same thing in *U. S. v. Va. Car. Chem. Co.*, 163 Fed. 66.

May we now square up the nature of Ewert's employment under the above decisions of the officers under whom he was employed and the decisions of the Supreme Court of the United States with the terms of his employment, and so arrive at the true and kind thereof? Ewert's letter of appointment (Tr., p. 26) follows:

You are hereby appointed a Special Assistant to the Attorney General to assist in the institution and prosecution of suits to set aside lands made to certain allotments in the Quapaw Indian Agency. Your compensation will be at the rate of \$— per month, coming when you enter upon duty, at which time you should execute and forward the necessary oath of office. Your official residence is fixed at Miami, Oklahoma, and when absent from that place on official business you will be allowed your necessary expenses of lodging and subsistence, and your actual traveling expenses, as provided by the Department's order dated September 1, 1907, a copy of which is herewith enclosed. Your appointment is subject to any change which may be made by the Department."

There is absolutely no proof of Ewert's work in "Indian affairs." There is not a single word of testimony showing that Ewert ever did institute a single suit to set aside the marshal's deeds. The evidence on the point of Ewert's employment, as found by the Court, is as follows:

From the facts shown in the evidence in relation to Mr. Ewert, the Court is of the opinion that the facts claimed to bring his purchase within the operation of this statute may be shortly stated. Mr. Ewert was an attorney at law formerly residing in Minnesota. On October 23, 1908, the Attorney General of the United States appointed him as a Special Assistant to the Attorney General to assist in the institution and prosecution of suits to set aside deeds to certain allotments in the Quapaw Indian Agency. His official residence was fixed at Miami, Oklahoma. He removed to Oklahoma going first to Muskogee and remaining there the greater part of the month of November. About the first of December he moved to Miami and has since that time continued to reside there for some months thereafter.

These facts sufficiently show that he was employed in Indian affairs.
(Italics are ours.)

With the greatest of deference to the opinion of this learned Court, the appellee, Ewert, inquires whether this is evidence of a character sufficiently strong and convincing to warrant this Court in finding that the facts recited "sufficiently show that he was employed in Indian affairs." As heretofore stated, the learned court has assumed much, presumably from reading the record, wherein the appellants offered some testimony tending to show that Ewert was employed at a later time in the prosecution of other suits. But all of that testimony was ruled out by the trial court. May we ask whether or not this Court found any substantial testimony of a convincing character that Ewert ever did enter upon his employment more than to take the oath of office and go to Oklahoma? If so, where does it appear? If there is doubt about it, the appellee should be given the benefit of that doubt.

Outside of the record, the appellee admits that there were, at the time of his appointment, already pending, eight suits theretofore filed by the United States, having for their purpose the setting aside of certain deeds to certain Indian lands, however, not Quapaw Indian lands, made by the United States marshal for Indian Territory under the direction of the Territorial United States Court for Indian Territory, in certain partition proceedings. The suits were instituted by the Government. The Indians were never consulted. The actions were purely suits instituted by the Department of Justice for the purpose of setting aside deeds in which it was claimed that the District Court for the Territory of Oklahoma erred in entertaining the partition suits and in partitioning the land and directing the United States marshal to execute deeds to certain purchasers. The lands themselves that were involved were not Quapaw Indian lands, as might be inferred from some of the testimony that was attempted to be introduced by the appellants and ruled out by Judge Campbell. The lands were located in the former reservations of the Shawnee, Ottawa and Seneca Indians. They were not located in the reservation of the Quapaw Indians, out of which Charles Bluejacket received his allotment.

The point here desired to be directed to the attention of the Court is that under the terms of Ewert's employment, he was not in fact performing any services or engaged in Indian affairs of any kind, in so far as they affected the tribe of Indians known as Quapaw Indians, of which Charles Bluejacket was an allottee.

Therefore, upon what testimony does this Court base its finding that "these facts sufficiently show that he was employed in Indian affairs"? Do the facts found by the Court and set forth in its opinion show that Ewert was so employed? Did he ever bring a single suit or enter upon his employment, and do any work that may be called Indian affairs?

And again, the sole evidence as to the nature of Ewert's employment is found in his letter of appointment, *supra*. Examining that letter, this Court will observe that Ewert was employed, not as an

officer, but as an attorney, by the Department of Justice, for the purpose of doing a lawyer's work and only a lawyer's work. The Court will observe that his compensation was at rate — \$ — per month, and the letter closes with the express statement: "This appointment is subject to any change which may be made by this Department." Squaring this up then, with the authorities hereinbefore cited in the letters of the Attorney General, it cannot be claimed that Ewert was an officer, because, as stated in the opinion of the Honorable Attorney General, *supra*, and by the Supreme Court of the United States, there was in Ewert's employment, "neither duration or continuance of duties, nor duration and continuance of duties." Plainly speaking, Ewert was hired by the month as an attorney; his salary was payable monthly; he was subject to discharge at any moment, and the nature of his employment was subject to change at any moment.

Here then, is there in the testimony a single word tending to show that Ewert, even under the terms of that employment, ever did any work of any kind to bear out the further statements of the Court that Ewert's business was only in connection with Indian lands and litigation concerning them? Where is there any testimony that he instituted any litigation, or that he ever did any work? The testimony of employment expressly stated that his appointment "is subject to any change which may be made by the Department." This learned Court need not be reminded again of the fact that this was a penal statute; that it is highly penal; that it subjected the defendant both to removal from office and to a fine of \$5,000.00, without any discretion upon the part of a court. How can this Court, in construing that kind of a statute under the evidence that it has before it, arrive at the conclusion set forth in the opinion? With the greatest of deference to the opinion of this learned Court, we suggest that there is no evidence to warrant any such finding. This Court must presume that Ewert's conduct, even under the construction of the law, was innocent, rather than guilty; that the nature of his employment was changed and that he did not institute the suits, rather than that he did.

There is much looseness of expression found in the record, as shown in the correspondence, but it must be borne in mind, and appellee must remember, that later on, after this purchase had been made and the deed conveyed, Ewert's terms of employment were enlarged, and that he was, under that enlargement, instituted certain suits involving lands of Quapaw Indians. But Judge Campbell rightfully ruled out such evidence offered by the appellants, as well as that offered by the appellee.

The appellee and his counsel must here beg the indulgence of this Court and ask leave to file a supplemental brief as a part of this petition for rehearing, by reason of the fact that the time for filing the petition is close at hand, and appellee has thus far been unable, although diligently prosecuting the inquiry, to procure from the Commissioner of Indian Affairs certain records, including rules and regulations promulgated by the Department of the Interior and the

office of the Commissioner of Indian Affairs under said Section 2078, governing "Trade with Indians."

This petition is therefore being now printed and will be filed and if the supplemental brief with further arguments cannot be printed and filed within the sixty days allowed by the rules of this Court, then an enlargement of the time will be asked.

254 For the reasons hereinbefore set forth, the judgment of this Court should be set aside and a rehearing granted, with a view of having the judgment of the lower court sustained by this Court.

HENRY C. LEWIS,
W. H. KORNEGAY,
PAUL E. EWERT,
Attorneys for Appellee.

Certificate of Counsel.

We, Henry C. Lewis, W. H. Kornegay and Paul A. Ewert, do hereby certify that we are the attorneys for the appellee in the above entitled cause, and that we have carefully examined the opinion of the Court in this cause, and certify that in our opinion this petition for rehearing is well taken and founded in point of law.

HENRY C. LEWIS,
W. H. KORNEGAY,
PAUL E. EWERT,
Attorneys for Appellee.

(Endorsed:) Filed in U. S. Circuit Court of Appeals Apr. 28, 1920.

255 In the United States Circuit Court of Appeals, Eighth Circuit.

No. 5316.

CARRIE BLUEJACKET, a Widow, et al., Appellants,

vs.

PAUL A. EWERT, Appellee.

Supplemental Petition and Brief on Rehearing.

For the reasons set forth in the closing paragraphs of appellee's petition for rehearing and brief in support thereof, there is now presented to this Court those rules and regulations promulgated by the Secretary of the Interior under the Act of Congress, a part of which is Section 2078, R. S., for the alleged violation of which this suit is based.

256 These rules and regulations were promulgated by the Secretary of the Interior of the United States under the recalled "Indian Act," and are brought down to the year 1904, and are as follows:

*Amended Rules and Regulations as Promulgated by Commissioner
of Indian Affairs Down to 1904.*

"Trade with Indian Tribes.

Licensed Traders.

517. The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to, the Indian tribes and to make such rules and regulations as he may deem just and proper, specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians. (Act of Aug. 15, 1876, Sec. 5, 19 Stats. 200.)

518. No person employed in Indian affairs shall have any interest or concern in any trade with Indians except for and on account of the United States; and any person offending herein shall be liable to a penalty of \$5,000, and shall be removed from his office. (Sec. 1078, R. S.)

519. Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without license, shall forfeit all merchandise offered for sale to the Indians found in his possession, and shall moreover be liable to a penalty of five hundred dollars: Provided, that this section shall not apply to any person residing among or trading with the Choctaws, Cherokees, Chickasaws, Creeks or Seminoles, commonly called the Five Civilized Tribes, residing in the Indian Territory, and belonging to the Union Agency therein; and provided further, that no white person shall be employed as a clerk by any Indian trader, except as trade with said Five Civilized Tribes, unless first licensed so to do by the Commissioner of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior (22 Stats. 179.)

520. Every person, other than an Indian, who, within the Indian country, purchases or receives of any Indian, in the way of barter, trade or pledge, a gun, trap, or other article commonly used in hunting, any instrument of husbandry, or cooking utensil of the kind commonly obtained by the Indians in their intercourse with the white people, or any article of clothing, except skins or furs, shall be liable to a penalty of \$50. (Sec. 2135, R. S.)

521. By the Act of July 23, 1892, it is enacted that Section 2139 of the Revised Statutes be amended so as to read as follows:
No ardent spirits, ale, beer, wine or intoxicating liquor or liquors of whatever kind shall be introduced, under any pretense, into the Indian country. Every person who sells, exchanges, gives, barter or disposes of any ardent spirits, ale, beer, wine or intoxicating liquors of any kind to any Indian under charge of any Indian superintendent or agent, or introduces or attempts to introduce any

ardent spirits, ale, wine, beer or intoxicating liquors of any kind into the Indian country shall be punished by imprisonment for not more than two years and by fine of not more than \$300 for each offense. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine or intoxicating liquors into the Indian country that the acts charged were done under authority in writing from the War Department, or any officer duly authorized thereunto by the War Department. All complaints for the arrest of any person or persons made for violation of any of the provisions of this Act shall be made in the county where the offense shall have been committed, or if committed upon or within any reservation not included in any county, then in any county adjoining such reservation, and, if the Indian Territory, before the United States Court commissioner, or commissioner of the Circuit Court of the United States residing nearest the place where the offense was committed, who is not for any reason disqualified; but in all cases such arrest shall be made before any United States Court commissioner residing in such adjoining county, or before any magistrate or judicial officer authorized by the laws of the state in which such reservation is located to issue warrants for the arrest and examination of offenders by Section 1014 of the Revised Statutes of the United States. And all persons so arrested shall, unless discharged upon examination, be held to answer and stand trial before the court of the United States having jurisdiction of the offense. (27 Stats. 260.)

522. If any superintendent of Indian affairs, Indian agent, or sub-agent, or commanding officer of a military post, has reason to suspect or is informed that any white person or Indian is about to introduce or has introduced any spirituous liquor or wine into the Indian country in violation of law, such superintendent, agent, sub-agent, or commanding officer may cause the boats, stores, packages, wagons, sleds and places of deposit of such person to be searched, and if any such liquor is found therein, the same, together with the boats, teams, wagons and sleds used in conveying the same, and also the goods, packages and peltries of such person shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court, and forfeited, one-half to the informant and the other half to the use of the United States; and if such person be a trader, his license shall be revoked and his bond put in suit. It shall, moreover, be the duty of any person in the service of the United States, or of any Indian, to take and destroy any ardent spirits or wine found in the Indian country, except such may be introduced therein by the War Department. In all cases arising under this and the preceding sections Indians shall be competent witnesses. (Sec. 2140, R. S.)

523. No part of Section 2139 or of Section 2140 of the Revised Statutes shall be a bar to the prosecution of any officer, soldier, sutler, or storekeeper, attache, or employee of the army of the United States who shall barter, donate or furnish in any manner whatsoever liquors, wines, beer or any intoxicating beverage whatsoever to any Indian. (Act July 4, 1884, 23 Stats. 260.)

524. Any loyal person, a citizen of the United States, of good moral character, shall be permitted to trade with any Indian tribe upon giving bond to the United States in the penal sum of not less than \$5,000 nor more than \$10,000 with at least two good sureties, to be approved by the superintendent of the district within which such person proposes to trade, or by the United States district judge or district attorney for the district in which the obligor resides, renewable each year, conditioned that such person will faithfully observe all laws and regulations made for the government of trade and intercourse with the Indian tribes, and in no respect violate the same. (Sec. 2128, R. S.)

525. The Act of March 3, 1901, provides as to the Osage Reservation as follows: 'On and after July first, nineteen hundred and one, any person desiring to trade with the Indians on said reservation shall, upon establishing the fact to the satisfaction of the Commissioner of Indian Affairs that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians. The Act of March 3, 1903, extends the above provision "to apply to all Indian reservations.'" (31 Stats. 1065, and 32 Stats. 1009.)

526. A 'proper person' is one whose personal character and influence among the Indians is conducive to their welfare and whose dealings with them are both honest and just. Bad morals, dishonest methods or extortionate prices are among the disqualifications of a 'proper person' to trade among Indians.

527. Application for license must be made in writing setting forth the full name and residence of applicant; if a firm, the full firm name and name of each member; the place it is proposed to carry
260 on the trade; the capital to be employed; the names of the clerks or other persons to be employed; the record of applicant for five years previous, etc. This application must be forwarded to the Commissioner of Indian Affairs.

528. Satisfactory testimonials as to the character of the applicant and his employees and their fitness to be in the Indian country must accompany this application.

529. Applications for license forwarded by the agent must be accompanied by the affidavit of the agent that neither he nor any person for him has any interest, directly or indirectly, present or prospective, in the proposed business or the profits arising therefrom, and that no arrangement for any benefit to himself or to other person or persons on his behalf is in contemplation in case the license shall be granted.

530. No license will be granted for a longer period than one year; but at the end of that time, if the Commissioner of Indian Affairs be satisfied that the trade has been conducted properly, and that the laws, the regulations and the terms of the license have been duly observed, a new license may be granted.

531. Application for renewal of license must be made to the Commissioner of Indian Affairs through the agent of the Indians with whom the trade has been carried on, and the agent must testify as to the record which applicant has made as trader and his fitness to continue as such under a new license.

532. The application for the renewal of a license must be made at least thirty days prior to the expiration of the existing license.

533. A new bond must be given with each renewal of license, as required in Section 534.

534. A bond in the penal sum of \$10,000 must be furnished by the person or persons licensed that they will faithfully observe all the laws and regulations made for the government of trade and intercourse with the Indian tribes, and will in no respect violate the same (Sec. 2128, R. S.)

535. The bond must be made out in accordance with the following instructions:

261 1. If a bond with individuals as sureties is given, there must be not less than two such sureties, but a guaranty company duly qualified under the Act of August 13, 1894, may be accepted as sole security.

2. The full name of the principal and each of his sureties should be written in the body of and so signed to the bond. If any woman signs as surety it must satisfactorily appear that she is unmarried; married women not being accepted as sureties except where, under the laws applicable, she is competent to make such a contract, and her separate property can be taken in the enforcement thereof, and except also where, under the laws applicable, she may sign with her husband, and thereby charge their community property with liability upon execution.

3. There must be a seal of wax, wafer or other adhesive substance attached to each signature. The printed word 'seal' or a scroll is sufficient.

4. The residence of each principal and surety must be distinctly stated, and the signature of each of them must be made in the presence of two witnesses, and it must appear for whom each witness signs.

5. The bond, if with individual sureties, must be approved by a United States district judge or attorney, and the approval must be of even or subsequent date to that of the bond.

6. Bonds must not be executed on Sundays or legal holidays.

7. Sureties (individuals) must not be bonded officers of the United States, or attorneys having business before the Indian Office, or employees of the principal.

8. Special pains must be taken to prevent erasures or mutilations of any kind in the bond, but if they do occur it must be explained

a certificate of the officer by whom the bond is approved that they were made before the bond was signed by the principal and his sureties.

536. If, after the license shall have been granted, a trader desires to employ persons other than those named in the license, their names, the capacity in which it is proposed to employ them, and satisfactory testimonials as to character, as required in section 528, must be furnished, and permission in writing obtained for their employment.

537. Agents must see that the employees of traders are fit persons to be in the Indian country, and that the rules respecting permits for such employees have been complied with, and if any of them are found to have objectionable habits, the facts must be immediately reported to the Indian Office, when steps will be taken to have them removed.

538. The principals of trading establishments will be held responsible for the conduct and acts of the persons in their employ in the Indian country; and an infraction, by such persons, of any of the terms or conditions of a license or any of the laws or regulations, will be considered good and sufficient cause for revoking the license, in the same manner as if the offenses were committed by the principals themselves.

539. Agents must familiarize themselves with the laws and regulations governing the business of licensed traders and see that they are strictly complied with. Any infraction of the laws or regulations, or of any of the terms and conditions of a license, with all the circumstances connected therewith, and any improper conduct on the part of traders, or persons in their employ in the Indian country, must be reported without delay by the agent to the Indian Office.

540. On January 1 and July 1 of each year the agent shall submit to the Indian Office a statement showing whether, and to what extent, each licensed trader has or has not complied with the laws and regulations governing trade with Indians.

541. If persons carry on trade within a reservation with the Indians without a license, or continue to trade after the expiration of a license without applying for renewal, agents will close the stores of such traders and immediately report the facts in the case to the Indian Office, in order that legal steps may be taken to enforce the penalties of the law.

542. Licenses will be revoked by the Commissioner of Indian Affairs whenever, in his opinion, the persons licensed, or any persons in their employ, have transgressed any of the laws or regulations made for the government of trade and intercourse with the Indian tribes, or have so conducted themselves that it would be proper to permit them to remain in the Indian country.

543. No trade with Indians is permitted at any other place than that specified in the license. Licenses do not cover branch stores.

Such stores are not allowed, as the business of a licensed trader must be managed by the bonded principal and not by an unbonded subordinate.

544. Traders must actually carry on the business themselves, and habitually reside upon the reservation where they are licensed. They will not be permitted to farm out, sublet, transfer or assign the business to others. The presence of a silent partner, not under bond, in any trading establishment will be considered sufficient cause for the revocation of the license.

545. Traders and all persons employed by them will confine themselves to their legitimate business according to the license issued. A license to trade with Indians does not confer upon the trader any rights or privileges in respect to herding or raising cattle upon the reservation. Use of reservation lands, whether tribal or allotted, for such purposes can be obtained by a trader only upon the terms and under the restrictions which apply to other persons. His license gives him no advantage over others in this respect.

546. License to trade does not confer the right to traffic in any uniform clothing, other than that of the United States, nor any medals, flags, arm bands, or other ornaments of dress bearing the figures, emblems or devices of any foreign power; nor does it authorize any trade with a tribe or tribes with whom intercourse may have been prohibited by the President of the United States, or who are engaged in hostilities.

264 547. Traders are forbidden to buy, trade for, or have in their possession any annuity or other goods of any description that have been purchased or furnished by the Government for the use or welfare of the Indians.

548. If any trader, his agent, or any person acting for or under him, shall sell any arms or ammunition at his trading post or other place within any district or country occupied by uncivilized or hostile Indians, contrary to the rules and regulations of the Secretary of the Interior, such trader shall forfeit his right to trade with the Indians, and the Secretary shall exclude such trader, and the agent, or other person so offending, from the district or country so occupied. (Sec. 2136, R. S.)

549. License to trade does not confer the right to traffic in or to have in possession any description of wines, ale, beer, cider, intoxicating liquor, or compound composed in part of alcohol or whisky.

550. Traders must see to it that no intoxicating liquor is allowed on or about their premises under any pretense. A violation of this rule by traders or a failure on their part to use their utmost efforts to suppress traffic in or use of intoxicating liquors, or to notify the Indian Office in regard to it, will subject them to revocation of license and removal from the reservations.

551. The sale of the mescal bean, or any product thereof, by traders is positively prohibited.

552. Traders are not permitted to keep their places of business open on Sunday. Violation of this rule will be considered sufficient cause for the revocation of a trader's license.

553. Gambling, by dice, cards, or in any way whatever, is strictly prohibited in any licensed trader's establishment or on the premises.

554. Before any goods are offered for sale, traders shall exhibit to the agent the original invoices of the goods intended for sale and also the bills of lading therefor, together with the price at which each article is to be sold; and it is the duty of the agent to see that the prices are fair and reasonable.

555. Invoices of purchase for the replenishment of the trader's stock, as well as the bills of lading for the same, must be submitted to the agent in the same manner and for the same purposes as is provided in the preceding section for the original purchase of stock.

556. The trader shall keep an itemized ledger, which shall give such description of the articles charged to each Indian that they can be easily and positively identified on the invoice, showing the original cost of such articles. The quantity and the price per pound, per yard, per bushel, etc., shall be stated. The amounts credited to each Indian shall also be itemized so as to show every cash payment made and every credit allowed for articles sold or services rendered by him, the kind, quantity and price allowed for each article sold, as well as the character and amount of labor performed, and the rate of compensation allowed therefor, to be stated.

557. Not exceeding the following rates of profit may be allowed traders on goods and supplies sold to Indians, after adding the expense of transportation to the first cost or invoice prices:

Dry goods, including blankets, woolen goods, shawls, hosiery, bed quilts, cotton goods, yarns, etc., 25 per cent.

Ready-made clothing, including underwear, 25 per cent.

Boots and shoes and rubber goods, 30 per cent.

Hats and caps, 30 per cent.

Notions, including beads, twine, gloves, etc., 35 per cent.

Groceries including canned goods, an average of 20 per cent.

Crockery, lamps and glassware, 25 per cent.

Furniture and woodenware, 25 per cent.

Harness, saddles, leather, etc., 25 per cent.

266 Miscellaneous articles, including clocks, sewing machines, churns, brass kettles, corn shellers, fanning mills, feed cutters, etc., 20 per cent.

All kinds of agricultural implements, 20 per cent.

Flour, meal, grain, etc., 20 per cent.

Wagons and wagon fixtures, 20 per cent.

Paints and oil, 30 per cent.

Stoves, hollow ware, tinware, stamped ware, 25 per cent.

Hardware, including nails, glass, grindstone, rope, horseshoes, etc., 25 per cent.

Patent medicines, the regular established retail price.

558. At least three written or printed copies, in both English and Indian (if the Indian language has been reduced to writing), of all the leading articles kept on sale, with the price of each article must be conspicuously posted about the agency, and one copy thereof must be posted in each trader's store. At least twice each year the trader must furnish the agent with a list of prices charged for staple articles.

559. The quality of all articles kept on sale must be good and merchantable.

560. Traders' weights shall conform to either Fairbank's or Howe's scales.

561. If credit is given Indians by a trader, he must take the risk of his action; no assistance in the collection of alleged claims will be given him by the agent. But whenever Indians obtain goods of the licensed trader on credit, they are expected to pay for the same promptly, in the manner and at the time agreed upon.

562. Traders must not pay Indians in tokens, tickets, store orders, or anything else of that character. Payment must be made in money, or in credit, if the Indian is indebted to the trader.

563. Indians must be permitted to sell their crops or other articles produced by them at available market towns, precautions being taken to guard them against fraud or obtaining intoxicating liquors."

267 An examination of said sections of the United States Statutes as above set forth and the rules and regulations promulgated thereunder, it would seem, could have no other effect than to convince the Court beyond a shadow of a doubt that the act of Ewert in purchasing land could not possibly have been within the contemplation of the lawmakers of this country when in 1834 that Act as it now stands, with the exception of the change in verbiage hereinbefore stated, was first enacted into law.

A reading of them must convince the Court that the entire Act related only to the licensing of traders and that the "trade" mentioned in Section 2078 referred only to that class of transactions and can under no circumstances be stretched far enough to include the transaction now before this Court.

To take these up section by section would needlessly lengthen this brief. However, the Court is respectfully asked to read and consider each section.

Consider the first Section No. 517, which is a part of the Act of August 15, 1876. That section empowers the Commissioner of Indian Affairs to appoint "traders" and to make rules and regulations specifying the kind and quantity of goods, the price at which such goods shall be sold to the Indians, etc.

Then comes the section here under consideration, to wit, Section 2078. This section names persons who shall not have trade with Indians. In other words, persons to whom the Government shall not issue licenses to establish trading posts.

Section No. 519 is taken from 22 Stats. 179, and provides that no person other than an Indian of full blood who has not been granted a license "shall act as a trader," and is prohibited from introducing goods or to trade therein, and prescribes a penalty.

268 Section No. 520, which became Section 2135 of the Revised Statutes, prohibits any person from trading or bartering with Indians relative to any of the instruments which they use in hunting, or for cooking, or their clothing, and provides a proper penalty.

Then follows the statutes prohibiting the trading in intoxicating liquors in the Indian country. Then come paragraphs Nos. 524, 525 and 526, defining the class of people who may be licensed as traders, etc.

With these rules and regulations before the court, it would seem that the court would irresistibly be drawn to the conclusion that the sole purpose of the Acts of Congress of which Section 2078 is a part was to permit the establishment of so-called "trading posts" and saying who would be entitled to receive licenses to establish these trading posts and who would not, together with the rules and regulations promulgated thereunder.

The Act itself in every detail points to that conclusion, even going to the extent (Sec. No. 557) of saying just how much profit shall be allowed and how the goods shall be weighed. The law itself is further considered in another portion of this petition and brief.

The removal of the restrictions by the terms of the statute, and the selling of the land with the approval of the Secretary of the Interior, had the effect of taking the transaction out of the law prohibiting trade with "Indians." This was not considered by the court in arriving at its opinion.

The lands in question were sold under the authority of that portion of Section 7 of the Act of Congress approved May 27, 1902 (32 Stats. 245-275), which reads as follows:

269 "That the adult heirs of any deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him may sell and convey the lands inherited from such decedent, but in case of minor heirs their interests shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the guardian, but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee."

The contention is now most earnestly made (and this point has not heretofore been considered by this Court) that the effect of the sale under this Act was to remove the restrictions of the Indian allottee so that the acceptance of the deed by Ewert was not trade with Indians, as contemplated under the provisions of the statute.

This Court has expressly held that the Act of June 7, 1897, Chapter 3, paragraph 1 (30 Stats. at Large, p. 72), which provides that

"The allottees of land within the limits of Quapaw Agency, Indian Territory, are hereby authorized to lease their lands for the period of three years for farming or grazing purposes, or ten years for mining or business purposes," was a distinct emancipation of these Indians for the period and purposes named, and for such periods the Government surrendered all guardianship over the Indians with respect to the specified leases of their lands."

U. S. v. Noble, Scott Thompson, et al., 197 Fed. 292.

270 Judge Ralph E. Campbell of the Eastern District of Oklahoma, in passing upon this same statute in the same case, took a similar view, and said, relative to this statute:

"In our opinion, Congress intended that within the limitations as to purposes and term the allottee should exercise the same independent right to lease his property and enjoy the proceeds thereof that the law gives to white citizens, and in lieu of the governmental supervision thus partially withdrawn, gives him the status of a citizen and access to a forum where, like any other citizen, he could redress his wrongs."

U. S. v. Abrams, 181 Fed. 851-52.

If the Quapaw Leasing Act of 1897 emancipated the Indian within that period, then surely the Act of May 27, 1902, *supra*, which gave to the heirs of deceased Indians the power to sell and convey their inherited lands if the deeds were approved by the Secretary of the Interior, had the effect of taking from these Indians, as to that transaction, their status as "Indians" within the purview of the statute. In other words, that they were emancipated. They were no longer Indians. Surely this Court does not intend to hold that where the restrictions have been removed under the several Acts of Congress permitting the removal of restrictions, that even an employee in the office of the Commissioner of Indian Affairs could not deal with a person of Indian blood the same as he could with a white man. He is thereby emancipated as to that land. He is a citizen. He has a right to transact business as he pleases, and there is nothing in any law or governmental policy which could, after any fashion, keep such a person in the status of an "Indian," as contemplated under the provisions of Section 2078.

271 The Act of May 27, 1907, *supra*, says that they shall have the right to sell their land and that the sale, if made and approved by the Secretary of the Interior, "shall convey a full title to the purchaser the same as if a final patent without restrictions upon alienation had been issued to the allottee." (In the first instance.)

Will this honorable Court point out wherein Ewert was having trade with Indians, as provided under the statute? Congress by the Act took from the grantors in that deed the status of Indians, and Ewert had a perfect right to deal with them as to this particular sale

and. We earnestly contend that upon this ground alone the judgment of this Court should upon this hearing be set aside, and judgment of the lower court sustained.

In holding that the deed to Ewert is void, this Court fixes an additional penalty not provided in the statute and not intended by law-making power. It therefore was error so to hold.

Section 2078, R. S., provides only two penalties, to-wit: Liability for the penalty of a fine of five thousand dollars, and the penalty of removal from office. It need not be argued to this Court that the penalty in itself is extraordinarily severe, and it must be presumed that Congress, when it provided such a penalty, thought that the punishment was severe enough. It surely cannot be gleaned from the section and the accompanying sections of the statute that it manifested that Congress intended to add the further penalty of forfeiture of the thing purchased from the Indian. In the day of that statute, the trading was principally barter, and the passing of personal property of small value from the Indian to the white man or from the white man to the Indian.

In holding as it does that the deed made through the office of the Department of the Interior to Ewert is null and void, the Court does attach an additional penalty, and one which countenances was not manifested by the Act of Congress itself. In holding, it contravenes the very face of its own decision in the

Dunlap v. Mercer, 156 Fed. 545.

The syllabus in that case was written by Circuit Judge Sanborn, as follows:

"The general rule that illegal contracts are void is not of universal application. It is qualified by the exception that where a contract is not evil in itself and its invalidity is not denounced as a penalty for its violation by the express terms of the statute, or by any implication from the language of the statute which it contains, and that statute prescribes other specific penalties, it is the province of courts to do so, and they will not thus affix an additional penalty not intended by the law-making power."

It can be said that the transaction that Ewert had in this case with the Secretary of the Interior of the United States was an evil one? Was not the land advertised for public sale seven consecutive times? Did not Ewert bid a thousand dollars more than any other person for the said land? Did not the Indian profit therefrom? Was not the Indian protected by law and by regulations of the most stringent character? Was not the fact of the purchase of the land by Ewert directed to the attention, before the approval of the deed, of the Secretary of the Interior and the Attorney General of the United States, and did they not both say that Ewert was within his legal rights, and that he was guilty of no offense?

273 Did Ewert, in fact, have any business relations with the Indians? Did he barter or trade with them? Did he persuade them after any fashion to become his grantors? Indeed, not. The transaction was fair and honorable and above-board, and in every way lawful unless contrary to the statute in question. Ewert was without fault, and should this Court now add an additional penalty to a statute which in itself, in the first instance, is severe beyond all reason?

On the other hand, the appellants cannot claim that the deed was unlawful upon the ground that it violates the statute because of Ewert's employment. The deed was made by the authority of and with the approval of the Secretary of the Interior, an executive official, and assuming that Ewert was acting in violation of law, yet these plaintiffs cannot set that up as a ground for rescission and cancellation of the deed.

Connolly v. Union Sewer Pipe Co., 184 U. S. 540.

The opinion of this Court is unsound in that it holds that the conveyance to Ewert can be impugned by the grantor and his heirs. The sovereign alone can object.

In this case an endeavor is being made to set aside a warranty deed made by the heirs of a deceased Indian allottee, who in the petition to the Secretary of the Interior under and pursuant to the rules and regulations agreed that the land should be sold in the manner that the Secretary of the Interior should prescribe. The only right not surrendered is the right to object to the making of the conveyance. They did not object to it. As the Court says in its opinion, "It must be presumed that they knew the grantee, Ewert, and knew how he was employed." The Secretary of the Interior

274 knew how he was employed. The Attorney General of the United States knew how he was employed. It is submitted that it is not a sound doctrine, nor is it well founded in the law, that in an instance of this kind an Indian may take the law into his own hands and ten years after the sale has been made bring an action to have the deed set aside—this in the face of the numerous and repeated decisions of every Secretary of the Interior of the United States in the last ten years, under whose auspices and authority the sale was made, and under the repeated decisions of every Attorney General of the United States holding that the deed was good.

But there is a further reason why the holding of the Court is unsound, and that is that in statutes of this kind the Supreme Court of the United States has repeatedly held, in construing such statutes, that such an action can not be sustained by a third party. An analogous situation is presented in the case of conveyances of real estate to national banks not permitted by Section 5137 of the Revised Statutes. A recent and leading case passing upon this section of the National Banking Act is that of

Kerfoot v. Merchants Bank, 218 U. S. 281,

the syllabus in which case is as follows:

"In the absence of clear expression of legislative intention to the contrary, a conveyance of real estate to a corporation for a

not authorized by its charter is not void, but voidable. The foreign alone can object; the conveyance cannot be impugned by the grantor, his heirs or third parties.

Although the conveyance of real estate in this case to a national was not one permitted by § 5137, Rev. Stat., title to the property passed to the grantee for the purposes expressed in the conveyance, and that instrument cannot be attacked as void by an heir of the grantor."

Counsel believe that the situations are alike by analogy and submit to this Court that the heirs of the Indian allottees, the grantors of Ewert, cannot sustain this action, and that the foreign alone can bring the suit if there is an action.

We earnestly urge that this is ground for rehearing, with a view to reversal by this Court of its own decision.

To avoid the risk of some little repetition, we now desire to submit a supplemental argument to that contained in the original petition, to present the matter after the following fashion:

I.

Is Ewert a person "employed in Indian affairs?"

II.

Is the buying of a tract of land from an individual Indian in trade with the Indians?"

III.

What was the penalty?

IV.

Is the prohibition removed by the laws on the subject of allotting land to Indian lands?

V.

Is the action of the Secretary of the Interior in approving the allotment final?

I.

Under the first subdivision an inspection of the Revised Statutes of the United States of 1878 is practically conclusive, when the other provisions of the chapter are analyzed. As stated in Black on Interpretation of Laws, paragraph 136, we look to the law and find the provisions clear. Such being the case, we do not look further. Section 2078, worded as follows, is the last of the chapter:

"No person employed in Indian Affairs shall have any interest or concern in any trade with the Indians except for and on account of the United States; and any person offending herein shall be liable to a penalty of five thousand dollars, and shall be removed from office."

The question most naturally recurring is, "What office?" Ewert held no office and cannot come within the statute. The answer is contained in other sections of the chapter.

First. The Board of Indian Commissioners, Sections 2039 to 42.

Second. Inspectors, 2043-44.

Third. Superintendents, 2046, 2047, 2048, 2049 and 2050.

Fourth. Agents, 2051.

Fifth. Military officers acting as Indian agents, 2062.

Sixth. Sub-Indian agents, 2065.

Seventh. Interpreters, 2068. These would properly be termed, perhaps, "employees."

Who were "employed?"

First. The persons provided by Section 2050, all of whom were under the supervision of the superintendent.

Second. Clerks provided by Section 2051.

Third. Interpreters, Section 2068.

Fourth. Instructors, Section 2071.

Under whose authority and jurisdiction were the officers and employees referred to in the chapter?

The President with the Secretary of the Interior makes the appointments direct, such as the agents and superintendents.

277 What duties were prescribed for the "persons employed in Indian Affairs" under the chapter? Nothing similar to the duties of Ewert, who was sent by the Attorney General to try some lawsuits, already instituted and filed. Tested by these rules, a person employed as Ewert was does not come within the prohibition of the statute. Could the Interior Department or any officer engaged in Indian affairs have removed Ewert? It is clear that a special assistant to the Attorney General was unheard of at the time of the adoption of the revision of 1878 and was never contemplated in the section. The legislation was concerned with what was in the chapter, and the reference was to what preceded. However, if we say that we must look to the other subjects embraced in the title "Indians," it cannot be enlarged to such an extent as to embrace Ewert. An inspection of the balance of the sections under this title shows no class of officer that is mentioned or employee that is men-

ed was of the kind and capacity of Ewert's employment. In all the officers and employees referred to or to which there is a possibility of reference, is the class that had theretofore been mentioned and with which the legislation was concerned. There was no comment in the briefs on the expression "employed in Indian affairs" being found in the revision, while in the original Act it was "Indian Department." Black on Interpretation, paragraph 137. It is that this does not imply a change in the law. If we refer to the original Act, found in Volume 4 of the Statutes at Large, page 729, from which the section with a change of phraseology was taken, it becomes apparent that the persons enumerated or rather those employed in the Indian Department were forbidden by a departmental order for the first time organized. Of course, it would embrace the case as admitted and held in the Douglas case. That a deputy may be appointed under Section 2074 while being an Indian agent, see Opinions of the Attorney General, Vol. XX, page 495.

Section 2067 provides that the President and the Secretary of the Interior shall appoint all the special agents and commissioners, while it provides that no person shall hold two offices at the same time under title. Interpreters were appointed under Section 2068, while employees provided for under Section 2071 were appointed by the President as teachers, etc., a report being required to be laid before Congress of what was done under this section annually. No precedent was had with reference to Ewert. Applying the general rule of construction, viz., that the section refers to what precedes, it certainly does not appear that a special assistant to the Attorney General was a person employed in Indian affairs.

II.

Did Ewert have any interest or concern in "any trade with the Indians?"

Evidently the term trade is employed in its sense as a business, an isolated transaction. The definitions of the terms as gathered from the lexicographers has already been pointed out. By reference, then, to the Act of Congress passed the same day as the Act organizing the Indian Department, from which the section was taken, the meaning of the term is made clear. The Act regulating trade and commerce appears in Volume 4, Statutes at Large, page 729. Section 2 clearly shows what is meant by trade. It is such business as required a license from the Indian agent. What did the license call for? Two years east of the Mississippi, three years west. It called for a bond in the sum of five thousand dollars. It further required trade to be carried on at certain places designated in the license.

Section 4 forbids the residing in the country as a trader, etc., under the penalty and pains of forfeiting license and goods. Section 7 concerns receiving of certain articles by "way of purchase, trade or pledge." Section 11 is the one referring to land, and

in the event any person should undertake to settle on it or survey it or to mark boundaries he should be removed.

It will be further observed that this Act clearly indicates what is "trade" refers to the other Act, in which the prohibition is found about being concerned in "trade," etc. When we refer to it, and especially Section 3, it becomes clear that a person acting under orders from the Department of Justice was not one of the persons employed in Indian affairs, as the superintendents of the respective agencies controlled all persons in the respective agencies who were employed in Indian affairs. Section 13 points in large measure to the class of people indicated in Section 14. It is very evident that the word "trade" used in Section 14 is the trade that was referred to in the other Act which could be carried on only at certain places and under a license, and never referred to an isolated transaction in land, as dealing in land was absolutely impossible. When we examine the provision of the Revised Statutes there is not found therein anything indicating that the word "trade" was used in any other sense than that used in the original Act—a thing of permanence and for which a license was issued, and which when the license was issued was lawful. In the Douglas case, the Court of Appeals held that where there were a series of Acts in the way of buying from various Indians and selling, it was trade within the meaning of the prohibition, and it was trade in commodities or personal property. This falls far short of being authority for the position that Ewert by buying the Indian land under the supervision and with the approval of the Secretary of the Interior was subjecting himself to a fine of five thousand dollars, and removal from office, and as here contended, acquiring no title by the Act.

III.

If it be conceded for the purpose of this argument that Ewert was a person employed in Indian affairs, and it be also conceded that the buying of a piece of land was in contemplation of the lawmaker as "having any interest or concern in any trade with the Indians," what under the Act was the consequence and what is the effect of the law concerning the allotting of land to an individual Indian and permitting the individual to sell it without restriction? It must be admitted that if the Indian had the privilege of selling without a special provision, saying to whom he could not sell, or to whom he could sell, he could sell to anybody he wanted to; otherwise there would yet remain partial restrictions and he would not have full power to sell. An examination of the enabling statute and the allotting statute shows conclusively that the only restraint on the sale of the lands belonging to a minor is that the minor shall have nothing to do with it, and it is sold by two officials, who ordinarily are not Indians, viz., the court guardian and the Secretary of the Interior, and the court guardian makes the deed under the permission of the court, and only in the way prescribed by the Secretary of the Interior. When one examines the regulations he finds that the guardian has very little to do with the matter; it is merely the com-

and the Secretary of the Interior, with the Secretary of the Interior having the last decision in the matter. Hence, the danger of undue influence is practically nil, unless we are prepared to go to the length of holding that an appointment to a position under the United States would carry with it such weight that the county judge, acting under state authority, and the Secretary of the Interior acting under United States authority, would be largely influenced thereby, an indictment that should not be brought on the evidence in this case, or in any case according to ordinary experience. On the subject generally of the restrictions coming off when permitted to sell, see *Jones v. Meehan*, Book 44, L. Coop. Ed. U. S. Supreme Court Reports. When the Act was passed there was not in anything whatever limiting the persons who could buy. When the jurisdiction was conferred upon the Secretary of the Interior to approve or disapprove, a discretion was vested in him that under the law could not be controlled by anybody. If the Secretary under the Act approves, it is as though there never were any restrictions. The purpose of the law would be absolutely frustrated if the court can set aside the judgment of the Secretary of the Interior on a matter that was brought to his attention, as was the purchase by Ewert prior to the approval of the deed. It is a familiar rule in the constructions of constitutions and statutes, that whenever there is confided to any officer or officer the discretion to approve or disapprove, there the discretion must remain, and no other body can interfere with it when the discretion has been exercised.

IV.

What penalties, if any, did Congress provide for a person employed in Indian affairs, who had interest or concern in trade with the Indians?

The penalties are set out, viz.: A fine of five thousand dollars and removal from "office." Ordinarily, the statutes in cases of this kind provide the penalties, and the courts do not add to them. Where the lawmaking body desires to cause a forfeiture of the fruits of the transactions, it says so. In the present case, before Ewert could be held to lose his land or not get it, it would be necessary for the statute to impose the penalty of rendering the deed void. One of the leading authorities on this proposition is *Dunlop v. Mercer*, C. C. A., 156 Fed. 552.

See also:

- Harris v. Runnels*, U. S. Up. Ct. L. Coop. Ed. Bk. 13, 903.
- Union National Bank v. Mathews*, U. S. Up. Ct. L. Coop. Ed. Bk. 25, 189.
- Union Gold Mng. Co. v. Rocky Mountain National Bank*, U. S. Ct. L. Coop. Ed. Bk. 24, 648.
- Hughes v. Snell*, (Okla.) L. R. N. S. 34, 1136.
- State Mutual Fire Ins. Co. v. Brinkly Stave & Heading Co.*, (Ark.) 31 S. W. 157.

Myers v. McGavock, (Nebr.) 58 N. W. 528.
 Notes to Hanna v. Kelsey, 33 L. R. A. N. S. 357.
 Lane v. Henry, (Wash.) 141 Pac. 364.
 Ferguson v. Fidelity & Deposit Co., 140 Pac. 700.

In this case an effort is being made to set aside a deed and the entire consideration therefor was received by a United States officer who was entrusted with the receipt of the same. The sale was made under the directions of the United States officer, and no negotiations were had between the Indian and the purchaser. The status of the purchaser was fully known to the Indian agent. It was fully known to the Secretary of the Interior. If the deed to Ewert was voidable, it was on account of the illegality of the sale. It is believed that when the Secretary passed upon the question it involved the question of "trade with Indians" (if the statute could be construed to apply to a single real estate transaction) and he exercised his judgment on the matter and acted as a quasi-judicial officer—it was the end of the matter, as he was entrusted with the regulation of trading with the Indians under the Act of Congress, and he thereby waived his own rules and regulations, as he has a right to do. If on the other hand it was a ministerial matter, he had more to do with promoting the trade by far than the purchaser. If the deed did not confer title, why did Congress so say? The approving officer was the same officer who was entrusted with the administration of the trading with the Indians, and Congress said that when he approved the deed all restrictions on the sale were removed. Therefore as this Court has held, the Indian's restrictions were removed, and he was a person sui juris, and the trade was not with an Indian.

The question always recurs as to whether Ewert in accepting the deed from an individual Indian was having concern or interest in trade with the "Indians." It must be remembered that the system of law enacted in 1834 was based upon the transactions occurring in the Indian country at that time. The penalty provided, as set out in Section 2124 of the Revised Statutes, was to be sued for by the United States in an action of debt, one-half to go to the benefit of the informer the remainder to the United States. The language is:

"All penalties which shall accrue under this title shall be sued for and recovered in an action in the nature of an action for debt, in the name of the United States, before any court having jurisdiction of the same in any state or territory in which the defendant shall be arrested or found," etc.

If this be true, and the statute mentions the penalty, can the court, without violating the rule on the subject of penalties, impose a penalty of forfeiture? That the statute had reference to commodities or rather to something else besides real estate Section 2125 affords conclusive proof. It provides for the prosecution by the person prosecuting in the manner provided for proceeding against goods, wares and merchandise brought into the United States in violation of the revenue laws. If we extend the

statute concerning interest in trade and its penalties to a real estate transaction, do we not have to take the remedy pointed out?

Under Section 2127 the Indian Agent is authorized to sell for the benefit of the Indians under regulations prescribed by the Secretary, any horses or other live stock. In case this is done, and the sale is made to an interpreter employed at the agency, or a school teacher at the agency, would it be seriously contended that the school teacher would have to deliver the property to the Indian who originally owned them, at his suit, or would the matter be redressed under Sections 2124 and 2125, by a suit at the instance of the Government? When the Government sued, could it stand? The answer must be "no," because the agent was empowered to sell without regard to the person buying. But does this statute fit the conditions existing at the time of the land sale? If it does, we must look to see how far reaching the statute is. If Ewert, an attorney hired to bring some suits to set aside court deeds, was a person employed in Indian affairs, would not the judge of the court before whom the cases were pending be also employed in Indian affairs? If this statute applies so as to forfeit the land, could an interpreter, or any person who was employed directly or indirectly about the agency, even as a teamster, put in a bid on Indian land sold at the agency? Could any person in any way connected with the Indian Department bid on any of the land that is regularly posted periodically and sold in the various nations each month, though he would have nothing to do with the matter of bringing about the advertisement, nothing to do with the appraisalment? Would the advertisement be true that says the property will be sold for cash to the highest bidder, a large part of those conversant with the advertisement and having nothing to do with it, were precluded from bidding? Could a county judge in Oklahoma, who at any time is called upon to approve deeds to inherited Indian lands coming within the jurisdiction of the county court, buy a piece of Indian land through the department, or by private contract? Could a lawyer, in the state of Oklahoma, who while having employment to defend or prosecute suits for Indian lands, or who was engaged in putting a probate sale through of Indian lands, buy from an Indian a piece of land, and if he did, would he forfeit to the United States the sum of five thousand dollars and besides incur the penalty of the deed being void? Could any officer of the state or nation who is under oath to support the laws of the United States, its Constitution and statutes, buy land from an Indian if the proper interpretation of the statute is that which this Court has applied to the transaction of Ewert? The answer must be that he could not. The lawyer under the Arkansas law put in force in the Indian Territory by Act of Congress was required under the Chapter of Mansfield's Digest to take an oath to support the Constitution and to faithfully discharge the duties of the office. He was admitted to practice by a court set up in the Indian country by the United States for the purpose of carrying on the regulation of Indian trade and intercourse. If the interpretation given to the statute in the present case is correct, could any of these officers legally buy in Oklahoma from an Indian a horse or cow, or anything else? Does the provision apply in

Oklahoma, and has it applied in Oklahoma since it was a state or since the United States courts were put in Indian Territory? We think not, for the simple reason that if it does, Oklahoma is not a state, and its citizens are not treated alike. The holding of the property is regulated by state law. The power was conferred upon the Indian by the laws of the United States to sell the land to whomsoever he could get to buy it, provided the Secretary approved, if the Indian was a competent person, and the holding of it thereafter was regulated by state law. In the event he was not competent, the Secretary of the Interior prescribed the rules and made the regulations. In the present case, apparently everything was done that was required under the Act of May, 1902. It is provided that the conveyance shall be such as though a fee simple title had been given to the Indian. Such being the case, the Indian was as much bound as was a white person, by a conveyance made by the Secretary, and all laws making any distinctions on account of the character of the holder were thereby set aside. In fact, when statehood came and the Constitution was formed, the Enabling Act provided that the Constitution should be republican in form and make no distinction in the enjoyment of civil or political rights on account of race or color. While primarily intended to protect the negro, it also protected the Indian, and also hedged him about with the same rights and burdens that the white man had under like circumstance. It is clear that if a white person had transferred the land to Ewert, he could not have gotten it back. The provisions of Section 2078 on the subject of trade with the Indians has evidently been modified by Congress directly, and also a legislative construction of the term "trade" has been given in the Act of Congress of July 31, 1882, Vol. 22 Statutes at Large, page 179. Section 2133 of the Revised Statutes was amended to read as follows:

"Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of five hundred dollars."

There was a further provision that this did not apply to the Five Civilized Tribes. If there was any statute that fitted the Ewert case it was this. It was not the case of being concerned or interested in trade with the Indians; it was the case of trading in Ewert's case, and the penalty prescribed for trading when unauthorized was forfeiture of the merchandise in possession and the penalty. Evidently Congress never thought that the term "trade" meant a real estate transaction. On May 2, 1890, Congress extended over the Indian Territory the Arkansas laws and provided by that Act for the recording of instruments. It later by Act of 1903 put in force laws on the subject of conveyances of real estate. By Section 43 of the Act of May 2, 1890, the Confederated Indians in the Quapaw Agency who might

take their allotment in severalty became citizens of the United States, and

"entitled to all the rights, privileges and benefits as such,"

there being a proviso that thereby they did not lose any of the rights or privileges they enjoyed as tribal members. By Section 29 of the Act (26 Stat. at Large 182) it is provided:

"And in all cases on contracts entered into by citizens of any tribe or nations with citizens of the United States in good faith and for valuable consideration, and in accordance with the laws of such tribe or nation, and such contracts shall be deemed valid and enforced by the courts."

288 By the Act of April 28, 1904 (33 Stats. at Large 573) the Arkansas laws were extended to embrace all persons and estates in the territory, whether Indian or not, and full jurisdiction was conferred upon the courts to settle the estates. It thus appears that the question of contracts with Indians with reference to inherited lands were never characterized by Congress as trade with the Indians, especially in Oklahoma, and that the sections on the subject of trade and license never applied to that kind of a matter. There seems to be a dearth of authority directly upon the propositions involved in this case. However, a very instructive decision can be found rendered by this Court upon the subject of the forfeiture of an automobile found carrying whiskey into Indian Territory. The case is *Shawnee National Bank v. United States*, 249 Fed. 584.

The point of decision was that an automobile did not come within the forfeiture clause of a wagon, and that the innocent owner should not suffer. In the present case none of the parties thought there was anything wrong with the Ewert purchase, and the very ones to whose discretion the matter was entrusted of approving the deed so thought. Why, then, should a penalty of any kind be visited upon Ewert? Why should rescission be allowed without a restoration of the money gotten and put into the hands of the Interior Department officials?

What respect should be shown by the courts to the acts of the department officials?

We think that where Congress has conferred upon the Secretary the power to prescribe the terms, and to approve a deed, that his determination that a person, whose only disability is that he was
289 employed in law suits to set aside court deeds, is a proper one to receive a conveyance is conclusive and the grantor cannot raise the question, neither can the Government, and the questions are forever set at rest. We think this power is conferred for several reasons:

First. When Congress provided that the land could be sold with the approval of the Secretary of the Interior, Congress left the mat-

ter of the qualification of the purchaser to the decision of the Secretary, and his decision is binding.

Second. The Indian having gotten all the land was worth and the full appraised value, cannot complain of any fraud or incapacity of the grantee because he was not hurt, or of the Secretary's decision.

Third. The grantee was not "employed in Indian affairs" as declared by Congress.

Fourth. The Secretary was called upon to decide whether the grantee was "employed in Indian affairs," and his decision that he was not is final.

Fifth. The question of the incapacity of the grantee to take the land by reason of his employment was submitted to the Department of Justice, in whose employ the grantee was, and that department passed on the question. So we have the constructions of two departments in whom was confided jurisdiction. It seems to us that the questions are fully met and decided by the Supreme Court of the United States in a long line of decisions. Aside from the general idea that the judiciary will always give the other departments credit for presumptively being correct, we have the positive Act of Congress leaving to the Secretary of the Interior the question of allowing the sale or not, and we have the further requirement that the deed when approved shall convey title as though there were no restrictions. If

an Indian could not make a conveyance so as to estop himself or his heir, there are restrictions, and the Act of Congress does not mean what it says.

We think that the Supreme Court of the United States in the case of

United States ex rel. West v. Hitchcock, Lawyer's Cooperative Ed. Book 51, p. 719,

has practically settled the questions of the effect of the department's finding, or rather the findings of the Secretary of the Interior and the Attorney General. It appears from this decision that under the statute referred to, in the estimation of Congress and also of the court, that the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior has the management of all Indian affairs. If this be true, could it be said that Ewert, who was in no way under the commissioner, was employed in Indian affairs? See

Johnson v. Townley, Vol. 20, p. 486, Lawyer's Coop. Ed.

Quinby v. Conlan, Lawyer's Coop. Ed. Vol. 26, p. 800.

Steel v. Smelting Co., Lawyer's Coop. Ed. Vol. 27, p. 226.

Louisiana v. McAdoo, Lawyer's Coop. Ed. Vol. 58, p. 1507.

In the present case, it was a question of fact as to whether Ewert was employed in Indian affairs, or at the most a mixed question of law and fact. These decisions having been made it was the end of it, even though a court might differ in view. The Indian was not defrauded. He got what was coming to him. He was not in a position to complain of the qualification of the purchaser, and can not

now do so. As to what was public policy in dealing with the Indian, the determination in a matter of this sort was confided to the Secretary of the Interior, both by the selling act and by the General Act putting the management of all Indian affairs in his hands under the direction of the secretary. It is not believed that anybody could complain except the government under these decisions, and if the government could complain it was under obligation to restore what was paid and received by it as the guardian of the Indian, otherwise the act of disaffirmance within itself would be most unjust. In other words, no equity would exist in such a proceeding.

The decree should be modified.

We come now to the question of the modification of the decree, if the Court should adhere to its views that the grantee was not allowed to receive the conveyance.

The general rule on the subject of rescission is found in Black on Rescission and Cancellation, Par. 617, and from this it clearly appears that a condition is restoration, and the offer to restore must be made. In the case of an infant, though this sale having been made by guardian, to-wit, the United States, it is not exactly applicable, such of the consideration as remains must be restored. At least a court, in trying to do equity, must itself be equitable, and make inquiry to see what has become of the property, and if the action is brought by a minor, inquire if the minor seeking cancellation has the property. It seems, however, that in case the sale was put through by a guardian, and rescission was later had, the infant should be bound to restore or to allow in the accounting all that was gotten by the guardian. The rule in a straight transaction made by an infant and disaffirmed by him is laid down in Paragraph 310 of Black on Rescission. The Oklahoma rule by statute can be found in Section 986, Revised Laws, and requires a restoration of everything of value received. See Dalton v. Hopper, 177 Pac. 573.

In this case, the infant, when the trade was made, was represented by two guardians, one the court guardian, the other the Secretary of the Interior. The decision of this Court is based on the theory that the evidence does not show any obligation to restore the purchase money, because the evidence does not show that the money got any further than the Secretary of the Interior. It is true the evidence does not specifically show what disposition was made of the money, but the petition itself shows that it was paid to the Secretary of the Interior for the benefit of the plaintiffs. Such being the case, the decree should be modified so as to direct an accounting on equitable principles, giving the defendant the benefit, of course, of the money on hand, if any, and of the money that actually was used for the benefit of the minors or their successors.

Another question comes up as to the statute of limitations. It appears that the Oklahoma statute of limitations in case of a sale of

minor land under order of court is special. It is found in Section 4655 of the Revised Laws of 1910, Second Subdivision, as follows:

"An action for the recovery of real property sold by executors, administrators or guardians, upon an order of judgment of a court directing such sale, brought by the heirs or devisees of the deceased person or the ward or his guardian or any person claiming under any or either of them by the title acquired after the date of the judgment or order, within five years after the date of the recording of the deed made in pursuance of the sale."

293 There is a limitation in Section 4656, but it cannot apply to this portion because the guardian is barred and so would the minor be, especially as the ward is barred also by the express terms of the statute. Clearly, Carrie Bluejacket would be barred as representing one of the minors. This question was recently decided by the Supreme Court of Oklahoma in *Glory v. Bagby*, not yet reported, against the position, though the decision was merely announced and no analysis made.

The records of the Court and of the Indian Agency located at Wyandotte, Oklahoma, show the following facts:

That Willie Bluejacket, whose interest in the estate passed to his mother, Carrie Bluejacket, died in March, 1912; that if he had lived he would have been twenty-one years of age prior to June 12, 1913; that Blanche Bluejacket attained her majority, to-wit, eighteen years of age, prior to June 12, 1913; that Amy Bluejacket was eighteen years of age in November, 1917; that Clyde Bluejacket is still a minor and will attain his majority on July 22, 1924.

The records of the Indian Office further show that the Secretary of the Interior still has in his possession some of the funds paid by Ewert as part of the purchase price of said land. The records further show that on the 12th day of June, 1916, when this suit was instituted, some of the heirs still had in their possession some of the funds and were in a position where they could have restored at least a portion of the consideration.

In support of that statement, there follows a letter just received from the office of the superintendent and disbursing agent of the Indian Office, located at Wyandotte, Oklahoma; that letter is as follows:

294

"Department of the Interior,
United States Indian Service,
Seneca School & Quapaw Agency,
Wyandotte, Oklahoma.

April 21, 1920.

Mr. Paul A. Ewert,
Frisco Building,
Joplin, Missouri.

DEAR SIR:

Replying to your letter of April 14th regarding disposition made of funds received from the sale of land by Blanche, Clyde, William and Amy Bluejacket, minor heirs of Charles Bluejacket, deceased, I have to advise that the old ledgers kept at that time have been destroyed, as the accounts were audited by the auditor of the Interior Department and approved by him. However, the files show that the money for Blanche Bluejacket, now Bear, was disposed of as follows:

Under Indian Office authority, dated March 13, 1912, paid to Dr. W. M. Campbell for medical services.....	\$18.00
Under Indian Office authority, dated Nov. 30, 1912, was expended for feed corn.....	55.65
For Hogs	54.00
For repair of buildings on homestead.....	306.47
Under I. O. auth., dated Feb. 4, 1913, for kitchen furniture and equipment	105.00
For doctor bill.....	7.45
For subsistence	59.73
Total expended	<u>\$606.30</u>

Derived as follows:

From the sale of the allotment of Charles Bluejacket.....	\$555.55
Interest on above account.....	50.75
Clyde Bluejacket received from this land sale.....	\$555.55
Interest on above up to May 2, 1918, at which time \$520.00 was invested in W. S. S.....	216.67

Balance, including interest since that time, has been paid to him in small payments for clothing and other personal needs. This balance has been paid by me and is shown by our personal account. The stamps, with the exception of 60, the value being \$259.80, are still held. The money received from the sale of these 60 stamps has been used in payment of doctor bills and the purchase of a team for this boy.

Amy Bluejacket received from this sale.....	\$555.55
Interest from above	181.40
Total	<u>\$736.95</u>

The above expended as follows:

Sept. 31, 1912, personal use.....	\$30.00
June 30, 1913, transfer to Supt. Wyly Haskell Institute for her personal use	70.00
June 3, 1913, clothing.....	10.00
June 21, 1913, for return from school.....	10.00
August 28, 1913, personal use.....	15.00
October 26, 1913, personal use.....	25.00
December 21, 1913, personal use.....	25.00
June 30, 1914, Supt. Wise, Haskell, personal use.....	40.00
August 20, 1914, personal use.....	15.00
Dec. 20, 1917	50.00
Jan. 7, 1918, Sidney Sparlin, for furniture.....	253.80
Jan. 7, 1918, Carrie Bluejacket, for horse.....	130.00
Jan. 7, 1918, personal use.....	25.00
June 12, 1918, balance of account, personal use.....	38.15
Total expenses.....	<u>\$736.95</u>

William Bluejacket received as his share of this sale.....	\$555.55
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And expended, under Indian Office authority, as follows:

March 13, 1912, W. H. Mitchell, for medicine.....	\$18.15
“ Saft Bros.....	77.50
“ McGammon Mercantile Company.....	18.85
296 “ Dr. W. H. Campbell.....	7.50
Authority No. 11312, Dr. W. H. Campbell.....	35.00
W. H. Mitchell	45.80
Carrie Bluejacket, support during sickness of son.....	105.00
Paid to mother on determination of heirs as sole heir.....	169.43

This is all the information I have as to the disposition of these funds, and trust it will serve your purpose.

Very truly yours,
(Signed)

G. A. RIECKER,
G. A. RIECKER,
Acting Superintendent.

G. A. R.—mcl.

4-21-20.

For the further information of this Court, counsel say that they are informed and believe that some of these Indian heirs have allotted lands of their own from which the restrictions have been

removed, and have assets of their own in the form of personal property, and are in a position to return at least a portion of the consideration.

It is submitted that in the interest of justice (if this Court shall adhere to its former opinion) that the decree should be amended as to carry out the equitable doctrines of the Court to the end that an accounting may be had, not only as to funds received by the appellee in this suit out of this land, but that there may be an offset as to moneys which the appellants should in good conscience and equity restore.

It is needless to here direct the attention of the Court to the equities of the matter, because this Court knows from the evidence that Ewert was blameless, and as stated in the opinion of the Attorney General and another opinion from the Secretary of the Interior, Ewert was without fault and in their judgment was within his legal rights, and that he had committed no offense and that there was no fraud in this transaction in any respect.

For the reasons hereinbefore assigned, it is respectfully submitted that a rehearing should be granted to the appellee, to the end that justice and equity may be done to the appellee and the decree of this Court be reversed and a judgment entered sustaining the findings of the trial Court.

Respectfully submitted,

W. H. KARNEGAY,
PAUL A. EWERT,
Attorneys for Appellee.

Certificate of Counsel.

We, W. H. Kornegay and Paul A. Ewert, do hereby certify that we are the attorneys for the appellee in the above entitled case, and that we have carefully examined the opinion of the Court in this case and hereby certify that, in our opinion, this supplemental petition for rehearing is well taken and founded in point of law.

W. H. KORNEGAY,
PAUL A. EWERT,
Attorneys for Appellee.

(Endorsed:) Filed in U. S. Circuit Court of Appeals Apr. 28, 1920.

(*Order Denying Petitions for Rehearing.*)

May Term, 1920.

Saturday, August 7, 1920.

This cause came on this day to be heard upon the petitions for a rehearing, filed by counsel for appellants and appellee. On consideration whereof, it is now here ordered by this Court,

that said petitions for a rehearing of this cause, be, and the same are hereby, denied. Sanborn, Circuit Judge, dissenting.

August 7, 1920.

(Motion of Appellee for Stay of Mandate Pending Filing of Petition for Appeal to Supreme Court U. S.)

Comes now the Appellee in the above entitled action, Paul A. Ewert and shows to this Court that on the 7th day of August, 1920, this Court denied the application of the said Appellee for a rehearing of said matter; that the Mandate of said matter is now due to be handed down, and this Appellee now petitions this Court for a Stay of the said Mandate until the 7th day of November, 1920, upon the ground that the said Appellee in good faith now intends to appeal said action to the Supreme Court of the United States and asks that the said Stay of Mandate be granted, pending the filing of said Petition for appeal and if so filed, until the said Appeal shall have been passed upon by the Supreme Court of the United States.

PAUL A. EWERT,
Appellee pro Se.

(Endorsed:) Filed in U. S. Circuit Court of Appeals Sep. 2, 1920.

299

(Order Staying Issuance of Mandate.)

September Term, 1920.

Monday, September 6, 1920.

Upon consideration of the motion of appellee, It is ordered by this Court that the issuance of the mandate of this Court, in this cause, be, and the same is hereby, stayed until November 7, 1920, pending the filing of a petition for appeal to the Supreme Court of the United States and if so filed, until the said appeal shall have been passed upon by the said Supreme Court.

September 6, 1920.

(Petition of Paul A. Ewert for Appeal to Supreme Court U. S. and Order Allowing Same.)

In the United States Circuit Court of Appeals for the Eighth Circuit.

No. 5316.

CARRIE BLUEJACKET, a Widow; ROSIE B. DAUGHERTY and Husband, Edward Daugherty; Ida M. Holden and Husband, Edward L. Holden; Walter Bluejacket, Edward Bluejacket and Wife, Delpha Bluejacket; Blanche Bear, Formerly Bluejacket, and Amy Bluejacket and Clyde Bluejacket, Minors, by Their Next Friend, Carrie Bluejacket, Their Mother, Appellees,

VS.

PAUL A. EWERT, Appellant.

To the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, or to any Associate Justice of the Supreme Court of the United States:

Now comes the appellant pro se and by his attorneys, Henry C. Lewis and W. H. Kornegay, and complains that in the record and proceedings and also in the rendition of the decree of the United States Circuit Court of Appeals for the Eighth Circuit, sitting at Saint Louis in the State of Missouri, in the above styled and numbered case on the 1st day of March, 1920,—reversing in part and affirming in part the decree of the United States District Court in and for the Eastern District of Oklahoma in said case, a petition for re-hearing in which was denied on August 7, 1920, having theretofore in due time been filed and considered,—manifest error has intervened to the great damage of the petitioner; that the jurisdiction of the United States Circuit Court of Appeals for the Eighth Circuit depended upon the fact that there was a diversity of citizenship between said parties, and that the issues of said case were based upon questions of law arising out of the construction of the Laws of the United States governing the allotment and sale of Indian lands, and a construction of Section 2078 of the Revised Statutes of the United States and the Laws and Treaties of the United States with the Quapaw Tribe of Indians then located in Nowata County, State of Oklahoma; that the amount involved therein and the matter in controversy exceeds the sum of three thousand dollars, exclusive of interest and costs, and this is not a case in which the jurisdiction of the Circuit Court of Appeals is made final. Wherefore: Petitioner prays for the allowance of an appeal, to the end that the cause may be carried to the Supreme Court of the United States, and petitioner prays for a supersedeas of said judgment and such other process as is required to perfect the appeal prayed for, to the end that the error therein may be corrected. And the said Paul A. Ewert, appellant, does hereby appeal from said decree and

order of the United States Circuit Court of Appeals for the Eighth Circuit, to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith and he prays that his said appeal be allowed, and that citation issue
 301 as provided by law, and that a transcript of the record, proceedings and papers upon which said decree and order was based, duly authenticated, be sent to the Supreme Court of the United States at Washington, in the District of Columbia.

And your petitioner prays that the proper order touching the security required of him to perfect his appeal be made.

W. H. KORNEGAY,
 HENRY LEWIS,
 PAUL A. EWERT,
Attorneys for Appellant.

The above petition is hereby granted and the appeal bond in the sum of Five Hundred Dollars therewith submitted, is hereby approved, this 21st day of October, 1920.

KIMBROUGH STONE,
*Judge of the Circuit Court of Appeals of the
 United States for the Eighth Circuit.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals Oct. 23, 1920.

(Assignment of Errors on Appeal to Supreme Court U. S.)

Comes now the appellant, Paul A. Ewert, pro se, and by his attorneys Henry C. Lewis and W. H. Kornegay, and says that the decree entered in the above entitled case on the 1st day of March, 1920, is erroneous and unjust to the appellant, for the following reasons, to-wit:

1. Because the Court erred in denying the motion of the
 302 said Paul A. Ewert to dismiss the appeal filed in said case in said Circuit Court of Appeals of the United States for the Eighth Circuit.

2. Because the Court erred in holding that the said Paul A. Ewert by his appointment as Special Assistant to the Attorney General of the United States "to assist in the institution and prosecution of suits to set aside deeds made to certain allotments in Quapaw Indian Agency," was employed in Indian affairs within the meaning of Rev. St. 2078 (Compiled Statutes, Paragraph 4026), providing that no person so employed shall have any interest or concern in trade with Indians.

3. Because the Court erred in holding that the purchase of the land in question by the said Paul A. Ewert while so employed constituted "trade with Indians" within the prohibition of the Revised Statute #2078 (Compiled Statute #4026), though the sale was made under and pursuant to the Act of May 27, 1902, Paragraph 7 (Compiled Statute #4023), and the rules and regulations promul-

gated thereunder by the Secretary of the Interior of the United States, although the said purchaser never saw or communicated with any of the Indians and they themselves were not conscious that he was so employed as Special Assistant to the Attorney General of the United States under the terms of his employment.

4. Because the Court erred in holding that

"Under Rev. Laws Okl. 1910, #885, authorizing minors to disaffirm contracts before majority or within one year thereafter, a suit by an Indian's minor heirs to set aside their guardian's conveyance of land was not barred by laches when brought before their majority,"

applied to the purchase of said lands by Paul A. Ewert.

303 5. Because the Court erred in holding that where in a suit to set aside a guardian's conveyance of the interest of minor heirs of deceased Indians, laches did not appear on the face of the bill or in plaintiff's proof, it is incumbent upon defendant to show the existence of laches, as applied to this suit.

6. Because the Court erred in holding that the rule that ordinarily it is necessary for one seeking the cancellation of a deed to do equity by restoring the consideration received does not apply to the disaffirmance of a deed by the infants suing, if prior to the disaffirmance and during infancy the consideration received has been disposed of, wasted or consumed and cannot be returned, as applied to the conduct of the minor heirs in this suit.

7. Because the Court erred in holding that in this suit it was not obligatory upon the minor heirs suing to restore the consideration paid by the purchaser to them and their guardian, the United States of America and its duly qualified and acting officer, to-wit: The Secretary of the Interior of the United States.

8. Because the Court erred in rendering judgment in favor of Amy Bluejacket.

9. Because the Court erred in rendering judgment in favor of Clyde Bluejacket.

10. Because the Court erred in rendering judgment in favor of Blanche Bear, formerly Bluejacket.

11. Because the Court erred in rendering judgment in favor of Carrie Bluejacket as the heir of William Bluejacket, deceased, for a cancellation of the deed from these four minor heirs to the said defendant.

12. Because the Court erred in reversing the decree of the lower Court and remanding the same with directions to grant the prayers of Amy and Clyde Bluejacket, of Blanche Bear, formerly Bluejacket, and of Carrie Bluejacket, as the heir of William Bluejacket, deceased, for a cancellation of the deed from these

304

four minor heirs to the defendant and for an accounting and an indemnification against the apparent lien of the mortgage on their shares of the land.

13. Because the Court erred in not affirming the judgment and decree of the trial Court.

14. Because the Court erred in not holding that the selling of the land in question under and pursuant to the Act of May 27, 1902, Paragraph 7, and the rules and regulations promulgated thereunder by the Secretary of the Interior, had the effect of removing the restrictions prior to the delivery of the deed, and so had the effect of taking the transaction out of the law prohibiting trade with "Indians".

15. Because the Court erred in holding that the deed to Ewert at the time of its execution and delivery was void, in this, that in so holding, the Court fixes an additional penalty not provided for in the statute and not intended to be placed therein by the Congress of the United States.

16. Because the Court erred in refusing to hold that the legality of the conveyance to Ewert can be questioned or impugned by the grantors and their heirs and that the sovereign alone can object.

17. Because the Court erred in holding that the purchase of the land by Ewert was "trade" with Indians within the meaning of the Statute.

18. Because the Court erred in holding that the sale of the land under the Act of May 27, 1902, by the Secretary of the Interior of the United States to the said Ewert was trade with "Indians."

305 19. Because the Court erred in failing to hold that as the Secretary of the Interior of the United States was called upon to decide before the delivery of the deed to Ewert, whether the grantee, Ewert, was employed in Indian Affairs, that his decision that Ewert was not so employed was final.

20. The Court erred in failing to hold that as the question of the incapacity of the grantee, Ewert, to take the said land under said sale by the Secretary of the Interior was submitted to the Department of Justice and decided in his favor, that said decision was final and binding upon the Courts in this case.

21. That the Court erred in not holding that both the adult heirs and the minor heirs were estopped from denying the validity of the deed in question under and pursuant to the laws of the State of Oklahoma, to-wit: Section 1150, Revised Laws, 1910, which reads as follows:

"Estoppel by receiving benefits.—Any person or corporation having knowingly received and accepted the benefits or any part thereof of any conveyance, mortgage or contract relating to real estate, shall be concluded thereby and estopped to deny the validity of such con-

veyance, mortgage or contract, or the power or authority to make and execute the same, except on the ground of fraud; but this section shall not apply to minors or persons of unsound mind who pay or tender back the amount of such benefit received by themselves."

Said minors not having tendered back the amount of benefit received.

22. The Court erred in not holding with the learned Judge Carland, then United States District Judge for the District of South Dakota, on the trial of the case of United States v. Jennie L. Douglas, that section 2078 applied only to sales of merchandise to Indians, not to purchases.

23. The Court erred in not holding that said Section 2078, R. S. does not apply to real estate transactions, and in any event, that it does not now so apply.

24. The Court erred in holding that the defendant, Ewert, under his employment was "an officer of the Indian Department."

25. The Court erred in not holding that the term "employed in Indian Affairs" found in section 2078, means "employed in the office of Indian Affairs."

26. The Court erred in not holding that the decision of the Secretary of the Interior of the United States, and of the Attorney General of the United States, and of the Commissioner of Indian Affairs that Ewert was within his lawful rights in purchasing said land, was such a Departmental construction in Ewert's favor as to make it controlling and the construction of the Statute to such an extent that the Court was bound to accept it.

27. The Court erred in not holding that under the terms of Ewert's employment as Special Assistant to the Attorney General of the United States, he was not restricted in purchases or commercial matters such as the purchase of the land in question, and in not giving due weight and consideration to the many opinions of the Office of the Attorney General of the United States to that effect in similar matters.

28. The Court erred because its decision is inconsistent with its own findings of fact, in this, that the Court, in Paragraphs 3 and 4 of its opinion, found as follows, to-wit:

"It is not shown that the defendant ever saw or communicated with any of the plaintiffs, or that the Indians were conscious that defendant was employed in Indian Affairs." * * *

"That the defendant therefore claims that he was not engaged in any trade with the Indians, but that his dealing was with the United States. This view ignores the fact that the plaintiffs in deciding whether to refuse or accept defendant's bid, in executing the deed to defendant as grantee may have signed because of confidence in his official position and his relation to Indians".

29. The Court erred in not holding that the defendant, Ewert, acting in such good faith in the purchase of said land that he is entitled to a restoration of the purchase price paid to the said Amos and Clyde Bluejacket and Blanche Bear and Carrie Bluejacket as the heirs of William Bluejacket, deceased, and that he is further entitled in the accounting between said parties, to offset the value of the improvements placed by him on said land, the taxes paid, etc., as shown by the testimony.

Wherefore: Appellant prays that the order and decree of the United States Circuit Court of Appeals for the Eighth Circuit be reversed and that the decree and judgment of the United States District Court for the Eastern District of Oklahoma be in all things affirmed.

W. H. KORNEGAY,
Vinita, Okla.;
HENRY LEWIS,
Washington, D. C.;
PAUL A. EWERT,
Attorneys for Appellant

(Endorsed:) Filed in U. S. Circuit Court of Appeals Oct. 23, 1919

308

(Bond on Appeal to Supreme Court U. S.)

Know all men by these presents:

That we, Paul A. Ewert and Amos Gipson are held and firmly bound unto Carrie Bluejacket, a widow, et al., in the full and just sum of Five Hundred Dollars, to be paid to the said Carrie Bluejacket, a widow, et al., their heirs, executors, administrators, successors or assigns, to which payment well and truly to be made, bind ourselves, our heirs, executors and administrators, successors or assigns, jointly and severally by these presents.

Sealed with our Seals, and dated this 19th day of October, in the year of our Lord One Thousand Nine Hundred and Twenty.

Whereas, lately at the December, 1919, term of the United States Circuit Court of Appeals for the Eighth Circuit, in a suit depending in said Court between Carrie Bluejacket, a widow, Rosie B. Daugherty and husband, Edward Daugherty, Ida M. Holden and husband, Edward L. Holden, Walter Bluejacket, Edward Bluejacket and wife, Delpha Bluejacket, Blanche Bear, formerly Bluejacket, and Amos Bluejacket, and Clyde Bluejacket, minors, by their next friends, Carrie Bluejacket, their mother, Appellees, and Paul A. Ewert, Appellant, a decree was rendered against the said appellant and the said appellant has obtained an appeal of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said appellees, citing and admonishing them to be and appear in the Supreme Court of the United States, at the City of Washington, District of Columbia, thirty days from and after the date of said citation

309

Now, the condition of the above obligation is such, that if the said appellant shall prosecute said appeal to effect, and

answer all costs if appellant fails to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in the presence of

PAUL A. EWERT. [SEAL.]
AMOS GIPSON. [SEAL.]

Approved by
KIMBROUGH STONE,
United States Circuit Judge.

STATE OF MISSOURI,
County of Jasper, ss:

Paul A. Ewert and Amos Gipson, first being duly sworn, each upon his oath says that the signature attached to the within Bond is his own signature; that he is worth the sum of Twenty-five Thousand Dollars over and above all liabilities; that he is a freeholder and a citizen of the State of Missouri, residing in the City of Joplin, in the County of Jasper, in the State of Missouri; that he attached his signature to the within Bond freely and voluntarily.

PAUL A. EWERT.
AMOS GIPSON.

310 Subscribed and sworn to before me, a Notary Public within and for Jasper County, State of Missouri, this 20th day of October, 1920.

My Commission expires Mch. 1, 1924.

[SEAL.]

SADIE M. WAX,
Notary Public, Jasper County, Missouri.

(Endorsed:) Filed in U. S. Circuit Court of Appeals Oct. 23, 1920.

(*Praecept of Paul A. Ewert for Transcript on Appeal to the Supreme Court U. S.*)

The Clerk of the Circuit Court of Appeals of the United States for the Eighth Circuit, is hereby asked and directed to prepare a certified transcript of the record in the above entitled cause for use on the appeal of said action heretofore duly had, to the Supreme Court of the United States, and to include therein the following:

1. A copy of this praecipe.
2. The entire printed transcript of the record used on the appeal of said cause to the Circuit Court of Appeals of the United States for the Eighth Circuit from the District Court of the United States for the Eastern District of Oklahoma.
3. The motion to dismiss the appeal in the above entitled cause.
4. Plaintiffs' protest against defendant's motion to dismiss the appeal.
5. Appellant's answer to plaintiffs' protest on motion to dismiss the appeal.

311 6. Order denying the motion to dismiss, and appellant's exceptions thereto, together with all the matters and records of the Clerk of this Court on said matter.

7. The order of the Court submitting said cause on briefs.

8. The opinion of the Circuit Court of Appeals in full in said cause.

9. The order, judgment and decree in this case.

10. The exceptions of said appellant, Paul A. Ewert, to said order, judgment and decree.

11. The order filing appellant's motion for rehearing.

12. Appellant's motion for re-hearing.

13. The order overruling said motion for re-hearing, and the exceptions of said appellant, Paul A. Ewert, to the same.

14. The order for mandate.

15. The mandate.

16. The petition for appeal, the bond for appeal, and the order allowing appeal to the Supreme Court of the United States, together with the assignments of error therewith filed.

17. Citation on appeal and acknowledgment of service thereof.

18. All and singular the minutes of the Clerk, and all orders made and entered in said cause in this Court.

HENRY LEWIS,
W. H. KORNEGAY,
Attorneys for Appellant.
PAUL A. EWERT,
Appellant, pro Se.

312 Receipt of a copy of the above præcipe is hereby admitted this 22nd day of October, 1920.

HIRAM W. CURREY,
Attorneys for Appellees.

(Endorsed:) Filed in U. S. Circuit Court of Appeals Oct. 23, 1920.

313 In the United States Circuit Court of Appeals for the Eighth Circuit.

No. 5316.

CARRIE BLUEJACKET, a Widow, et al., Appellee,
vs.

PAUL A. EWERT, Appellant.

Citation on Appeal.

To Carrie Bluejacket, a widow; Rosie B. Daugherty and husband, Edward Daugherty; Ida M. Holden and husband, Edward L. Holden; Walter Bluejacket, Edward Bluejacket and Wife, Delpha Bluejacket; Blanche Bear, formerly Bluejacket, and Amy Bluejacket and Clyde Bluejacket, minors, by their next friend, Carrie Bluejacket, their mother, appellees, and to A. Scott Thompson and H. W. Currey, their attorneys, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the City of Washington, District of Columbia, on the 20th day of November, 1920, pursuant to an order allowing an appeal, filed and entered in the Clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, from the final order, judgment and decree signed, filed and entered on the 1st day of March, 1920, a rehearing having been denied, Aug 1 1920 in that certain suit, being in Equity No. 5316, wherein Carrie Bluejacket, a widow, Rosie B. Daugherty and husband, Edward Daugherty, Ida M. Holden and husband, Edward L. Holden, Walter Bluejacket, Edward Bluejacket and wife, Delpha Bluejacket, Blanche Bear, formerly Bluejacket, and Amy Bluejacket and Clyde Bluejacket, minors, by their next friend, Carrie Bluejacket, their mother, are Appellees, and Paul A. Ewert is Appellant, to show cause, if any there be, why the decree rendered in said cause, as in said order allowing the appeal mentioned, should not be granted, and why justice should not be done to the parties in that behalf.

314 Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this the 21 day of October, 1920, and of the Independence of the United States the one hundred and forty-fourth.

Approved.

KIMBROUGH STONE,
United States Circuit Judge.

The receipt of a copy of the above citation and service thereof is acknowledged this 22nd day of October, 1920.

Attorneys for Carrie Bluejacket et al.

STATE OF MISSOURI,
County of Jasper, ss:

Cora Hallam, of lawful age, upon oath being duly sworn deposes and says that she is the Clerk of Paul A. Ewert, the Appellant in the above entitled case. That on the 22nd day of October, 1920, she served the above Citation on Appeal by handing to and leaving with H. W. Currey, one of the attorneys for the appellees, a true and correct copy of said within citation.

CORA HALLAM.

Subscribed and sworn to before me, a Notary Public within and for Jasper County, Missouri, this 22nd day of October, 1920.

My commission expires Meh. 1, 1924.

[Seal of Sadie M. Wax, Notary Public, Jasper County,
Missouri.]

SADIE M. WAX,
Notary Public, Jasper County, Missouri.

314½ [Endorsed:] No. 5316. In the United States Circuit Court of Appeals for the Eighth Circuit. Carrie Bluejacket, a widow, et al., appellees, vs. Paul A. Ewert, appellant. Citation on appeal to Supreme Court U. S. and affidavit of service. Filed Oct. 23, 1920. E. E. Koch, Clerk.

315 (Waiver of Citation on Appeal to Supreme Court U. S., etc.)

Come now Carrie Bluejacket, a widow, Rosie B. Daugherty, and husband, Edward Daugherty, Ida M. Holden, and husband, Edward L. Holden, Walter Bluejacket, Edward Bluejacket and wife, Delpha Bluejacket, Blanche Bear, formerly Bluejacket, and Amy Bluejacket, and Clyde Bluejacket, minors, by their next friend, Carrie Bluejacket, their mother, Appellees in said above named case, by their Attorneys, A. Scott Thompson and H. W. Currey, and acknowledge receipt of a copy of the foregoing præcipe for transcript of the record in the above entitled case, and join with the request of the Appellant that the record in said case be composed of the papers as in said præcipe set forth, and hereby waive the issuance and service of a Citation on Appeal in said cause.

Dated this 22 day of October, 1920.

A. SCOTT THOMPSON,
HIRAM W. CURREY,

Attorneys for Appellees.

HENRY LEWIS,
W. H. KORNEGAY,

Attorneys for Appellant.

P. A. EWERT,
Pro Se.

(Endorsed:) Filed in U. S. Circuit Court of Appeals Nov. 5, 1920.

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, prepared in accordance with the præcipe of Paul A. Ewert, in a certain cause wherein Carrie Bluejacket, a widow, et al., were appellants, and Paul A. Ewert was Appellee, No. 5316, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with affidavit of service endorsed thereon is hereto attached and herewith returned. In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this seventeenth day of November, A. D. 1920.

[Seal of the United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
*Clerk of the United States Circuit Court of
Appeals for the Eighth Circuit.*

317 Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, Prepared in Accordance with the Præcipe of Counsel for the Appellants in the Case of Carrie Blue-jacket et al., Appellants, v. Paul A. Ewert, No. 5316, on the Appeal by said Appellants to the Supreme Court of the United States.

318 (*Petition of Carrie Bluejacket et al. for a Rehearing.*)

United States Circuit Court of Appeals, Eighth Circuit.

No. 5316.

CARRIE BLUEJACKET et al., Appellants,

vs.

PAUL A. EWERT, Appellee.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

The appellants, Carrie Bluejacket et als., request a rehearing and reargument on the judgment in the above cause rendered and filed herein on the 1st day of March, 1920, upon the grounds and for the reasons following, to-wit:

(1) If the statute of limitations of Oklahoma is applicable, it is controlled by subdivision four (4) of Section 4655, Revised Laws of Oklahoma of 1910, and the above action was not barred. *Campbell v. Dick*, 176 Pac. 520 (Okla.).

(2) Because the judgment of the court fails to give consideration to the fact that the lands claimed by appellee, Ewert, were allotted Quapaw Indian lands with restrictions against alienation thereon, and any conveyance made by the heirs except as provided by Acts of Congress is utterly void.

(3) The deed being void, the land was and is now restricted from sale except as provided by law. This being the condition, the statute of limitation does not run against the Indian heir and laches or estoppel are not imputable to the restricted land owner.

* * * * *

319 Respectfully submitted,

HIRAM W. CURREY,
Joplin, Mo.;
A. SCOTT THOMPSON,
Miami, Okla.,
Attorneys for Petitioners.

We, Hiram W. Currey and A. Scott Thompson, hereby certify that we are counsel for the petitioners, and that in our opinion the above

and foregoing petition for rehearing interposed in the above styled case, and each and every part thereof, is well founded on point of law and is proper to be filed and considered by this court, and that such petition is offered in good faith and not for delay.

HIRAM W. CURREY.
A. SCOTT THOMPSON.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Apr. 24, 1920.

(Order Denying Petitions for Rehearing.)

May Term, 1920.

Saturday, August 7, 1920.

This cause came on this day to be heard upon the petitions for a rehearing, filed by counsel for appellants and appellee.

On consideration whereof, it is now here ordered by this Court, that said petitions for a rehearing of this cause, be, and the same are hereby, denied. Sanborn, Circuit Judge, dissenting.

August 7, 1920.

320 *(Petition of Appellants for Appeal to Supreme Court U. S.)*

In the United States Circuit Court of Appeals for the Eighth Circuit.

No. 5316.

CARRIE BLUEJACKET, a Widow; ROSIE B. DAUGHERTY and Husband, Edward Daugherty; Ida M. Holden and Husband, Edward L. Holden; Walter Bluejacket, Edward Bluejacket and Wife, Delpha Bluejacket; Blanche Bear, Formerly Blanche Bluejacket, and Amy Bluejacket and Clyde Bluejacket, by Their Next Friend, Carrie Bluejacket, Their Mother, Appellants,

VS.

PAUL A. EWERT, Appellee.

to the judges of the United States Circuit Court of Appeals for the Eighth Circuit:

The above named Carrie Bluejacket, Rosie B. Daugherty, Edward Daugherty, Ida M. Holden, Edward L. Holden, Walter Bluejacket, Edward Bluejacket, Delpha Bluejacket, and Blanche Bear, feeling themselves aggrieved by the judgment and decree rendered and entered in the above entitled cause on the 7th day of August, 1920, do hereby appeal from said judgment and decree to the Supreme Court of the United States, for the reasons set forth in the Assignment of errors filed herewith, and they pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the proceedings and documents upon which said judgment and de-

crees were based, duly authenticated, be sent to the Supreme Court of the United States sitting at Washington, District of Columbia, under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of them be made.

321

CARRIE BLUEJACKET,
ROSIE B. DAUGHERTY,
EDWARD DAUGHERTY,
IDA M. HOLDEN,
EDWARD L. HOLDEN,
WALTER BLUEJACKET,
EDWARD BLUEJACKET,
DELPHA BLUEJACKET, AND
BLANCHE BEAR,

By HIRAM W. CURREY,
Their Attorney.

(Endorsed:) Filed in U. S. Circuit Court of Appeals Nov. 6, 1920.

(Assignment of Errors of Appellants on Appeal to Supreme Court U. S.)

Now comes Carrie Bluejacket, Rosie B. Daugherty, Edward Daugherty, Ida M. Holden, Edward L. Holden, Walter Bluejacket, Edward Bluejacket, Delpha Bluejacket, and Blanche Bear, the appellants in the above entitled cause and file the following Assignment of Errors, upon which they will rely in this prosecution of the appeal in the above entitled cause from the judgment and decree made by this Court on the 7th day of August, 1920.

I.

The Circuit Court of Appeals rightfully adjudged that the appellee's purchase was prohibited by United States Revised Statutes, Section 2078, but erred in adjudging that appellants could not recover by reason of the statute of limitations of Oklahoma, or delay in bringing their suit.

II.

322 The Circuit Court of Appeals for the Eighth Circuit erred in ruling that these appellants are barred of their right of action on account of delay in bringing their suit, since there had been no change in said property affecting the value thereof, nor any change in the title; and, being Quapaw Indians, under the guardianship of the United States, there is no presumption that they knew of their right, and no proof of such fact in the record.

III.

The United States Circuit Court of Appeals for the Eighth Circuit erred in ruling that the plaintiffs were barred of their right of action

on account of Laches. The appellee obtained his deed in violation of the express inhibition of the acts of Congress and his possession under such deed was illegal, unlawful, and at all times that of a trespasser, and color of title cannot be obtained by acts prohibited by Public Policy, nor can possession once so obtained ripen into lawful or rightful adverse possession.

IV.

The United States Circuit Court of Appeals for the Eighth Circuit erred in ruling and holding that these appellants were barred of their right of action to recover the real estate described in their bill of complaint by reason of Laches in bringing their suit, and erred in ruling that "the bill contains no allegations and the proofs afford no facts to take the case out of the ordinary rule," which requires suits to set aside instruments procured by fraud to be promptly begun and prosecuted, and erred in ruling that the time within which these appellants could have brought these suits had expired when this suit was begun, since the applicable Statute of Limitations is subdivision 4, of Section 4655, Revised Laws of Oklahoma, 1910, which reads:

"Fourth. An action for the recovery of real property not hereinbefore provided for, within fifteen years."

323 Wherefore, The appellants pray that the said judgment and decree dismissing the bill herein as to these appellants be reversed and that the said United States Circuit Court of Appeals for the Eighth Circuit be ordered to enter a decree reversing the decision of the trial court and directing the said trial court to enter a decree as prayed for in the appellant's bill, or that the said Circuit Court of Appeals be directed to enter a decree reversing the trial court's decree, and to enter a decree as prayed for in the petition of these appellants.

A. SCOTT THOMPSON, AND
HIRAM W. CURREY,
Attorneys for the Appellants.

(Endorsed:) Filed in U. S. Circuit Court of Appeals Nov. 6, 1920.

(Order Allowing Appeal by Appellants to Supreme Court U. S.)

On motion of Hiram W. Currey, solicitor and counsel for complainant it is hereby ordered that an appeal to the Supreme Court of the United States from the judgment and decree heretofore filed and entered herein, be and the same is hereby allowed, and, that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the Supreme Court of the United States.

It is further ordered that the Bond on Appeal be fixed at the sum of Five hundred Dollars.

Dated this 5th day of November, 1920.

KIMBROUGH STONE,
Circuit Judge.

324 (Endorsed:) Filed in U. S. Circuit Court of Appeals Nov 6, 1920.

(Bond of Appellants on Appeal to Supreme Court U. S.)

Know all men by these presents, that we, Carrie Bluejacket, Rosie B. Daugherty, Edward Daugherty, Ida M. Holden, Edward L. Holden, Walter Bluejacket, Edward Bluejacket, Delpha Bluejacket, and Blanche Bear, as principal, and The Aetna Casualty and Surety Company of Hartford, Conn., as sureties, of the County of Jackson, State of Missouri, are held and firmly bound unto Paul A. Ewert in the sum of Five hundred Dollars, (\$500.00), lawful money of the United States, to be paid to him and his executors, administrators and successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors and administrators, by these presents.

Sealed with our seals and dated this 4th day of November, 1920.

Whereas the above named Carrie Bluejacket, Rosie B. Daugherty, Edward Daugherty, Ida M. Holden, Edward L. Holden, Walter Bluejacket, Edward Bluejacket, Delpha Bluejacket, and Blanche Bear have prosecuted an appeal to the Supreme Court of the United States to reverse the judgment of the Circuit Court of Appeals for the Eighth Circuit, in the above entitled cause:

Now, therefore, the condition of this obligation is such that if the above named Carrie Bluejacket, Rosie B. Daugherty, Edward Daugherty, Ida M. Holden, Edward L. Holden, Walter Bluejacket, Edward Bluejacket, Delpha Bluejacket, and Blanche Bear, shall prosecute their said appeal to effect and answer all costs if they fail to make good their plea, then this obligation shall be void otherwise to remain in full force and effect.

325 CARRIE BLUEJACKET,
ROSSIE B. DAUGHERTY,
EDWARD DAUGHERTY,
IDA M. HOLDEN,
EDWARD HOLDEN,
WALTER BLUEJACKET,
DELPHA BLUEJACKET,
BLANCH BEAR,

By HIRAM W. CURREY,
Their Attorney.

[SEAL.] THE AETNA CASUALTY AND SURETY
COMPANY.

By C. A. BUSSETT,
Resident Vice-President.

Attest:

M. E. FLORA,
Resident Assistant Secretary.

Approved Nov. 5th, 1920.
KIMBROUGH STONE,
Circuit Judge.

(Endorsed:) Filed in U. S. Circuit Court of Appeals Nov. 6, 1920.

326 In the United States Circuit Court of Appeals for the Eighth Circuit.

No. —.

CARRIE BLUEJACKET, a Widow; ROSIE B. DAUGHERTY and Husband, Edward Daugherty; Ida M. Holden and Husband, Edward L. Holden; Walter Bluejacket, Edward Bluejacket and Wife, Delpha Bluejacket, and Amy Bluejacket and Clyde Bluejacket, Minors, by Their Next Friend, Carrie Bluejacket, Their Mother, and Blanche Bear, Formerly Blanche Bluejacket, Plaintiffs,

vs.

PAUL A. EWERT, Defendant.

Citation.

UNITED STATES OF AMERICA, *ss.*

To Paul A. Ewert, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the City of Washington in the District of Columbia, on the 4th day of December, 1920, pursuant to an order allowing an appeal filed and entered in the Clerk's Office of the Circuit Court of Appeals for the Eighth Circuit, from a final judgment and decree filed and entered on the 7th day of August, A. D., 1920, in that certain suit, being Number 5316, wherein Carrie Bluejacket, et al., were appellants, and you were appellee, to show cause, if any there be, why the judgment and decree rendered against the said appellants, as in said order allowing appeal mentioned, should not be corrected, and why justice should not be done to the parties in that behalf.

Witness the Honorable Kimbrough Stone, Judge of the United States Circuit Court of Appeals for the Eighth Circuit, this 5th day of November, 1920, and of the Independence of the United States the 144th.

KIMBROUGH STONE,
Judge of the U. S. C. C. A., 8th Circuit.

327 I hereby, this 8th day of November, 1920, accept due personal service of this citation on behalf of appellee.

PAUL A. EWERT,
Appellee.

328 [Endorsed:] U. S. Circuit Court of Appeals, Eighth Circuit. No. 5316. Carrie Bluejacket et al., appellants, vs. Paul A. Ewert. Citation on cross-appeal to Supreme Court U. S., with acceptance of service. Filed Dec. 2, 1920. E. E. Koch, clerk.

329 (*Præcipe for Transcript on Cross-appeal to Supreme Court U. S.*)

The Clerk of the Circuit Court of Appeals of the United States for the Eighth Circuit is hereby directed to prepare and certify a transcript of the record in the above entitled case for the use of the Supreme Court of the United States, by including the following:

1. Copy of this præcipe.
2. Motion for re-hearing filed by these appellants, and order overruling said motion.
3. Order for mandate, and the mandate.
4. Petition for appeal, assignment of errors, and order allowing appeal, copy of bond on appeal and approval thereof.
5. Copy of Citation and acknowledgment of service.

This is cross-appeal, and appellants will use record on appeal of the defendants, as provided by Revised Statutes, Section 1013.

A. SCOTT THOMPSON AND
HIRAM W. CURREY.

Receipt of a copy of the above is hereby admitted, this 8th day of November, 1920.

PAUL A. EWERT,
Deft.

(Endorsed:) Filed in U. S. Circuit Court of Appeals Dec. 2, 1920.

330

(*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing ten pages contain full, true and complete copies of the record entries and proceedings had and filed in said Circuit Court of Appeals, prepared in accordance with the præcipe of appellants for a transcript on appeal to the Supreme Court of the United States, in the case of Carrie Bluejacket, et al., Appellants, v. Paul A. Ewert, No. 5316, as full, true

and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acceptance of service is hereto attached and herewith returned.

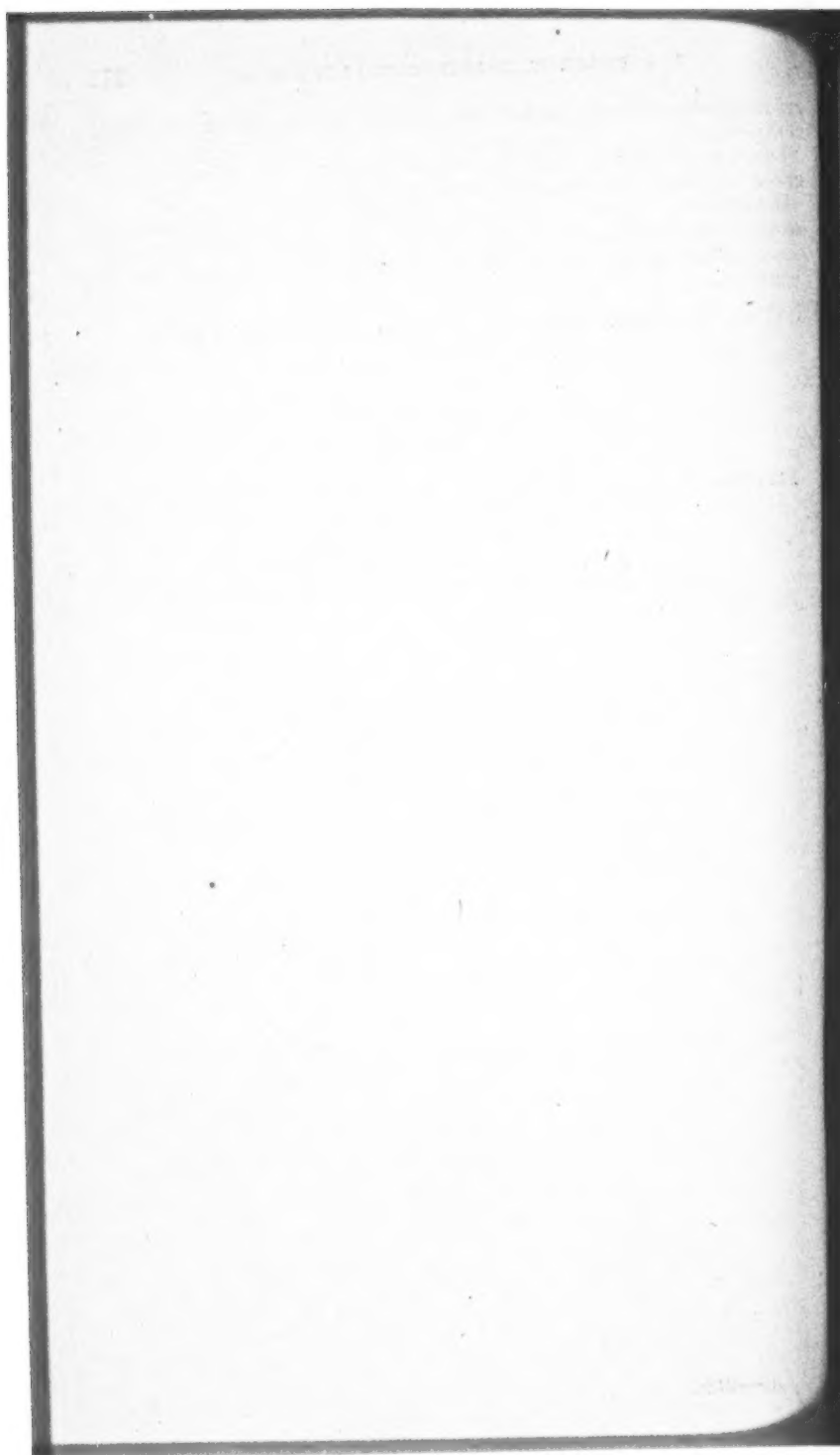
In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this third day of December, A. D. 1920.

[Seal of United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
*Clerk of the United States Circuit Court of
Appeals for the Eighth Circuit.*

Endorsed on cover: File No. 27,981. U. S. Circuit Court Appeals, 8th Circuit. Term No. 624. Paul A. Ewert, appellant, vs. Carrie Bluejacket, a widow, et al. Filed November 29, 1920. File No. 28,010. Term No. 653. Carrie Bluejacket, a widow, et al., appellants, vs. Paul A. Ewert. Filed December 18th, 1920. File Nos. 27,981 and 28,010.

(2993)



No. 173.

FILED
JAN 16 1921

WM. R. STANSBURY
CLERK

IN THE
Supreme Court of the United States

PAUL A. EWERT, APPELLANT,

VS.

CARRIE BLUEJACKET, A WIDOW, ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

**STATEMENT, BRIEF AND ARGUMENT OF
APPELLANT.**

PAUL A. EWERT,
Joplin, Mo.,

HENRY C. LEWIS,
Washington, D. C.,

W. H. KORNEGAY,
Vinita, Okla.,

Attorneys for Appellant.

INDEX.

	Page
Statement	1
The Petition of the Plaintiffs	9
Paragraph V of Plaintiffs' Petition	11
Paragraph VI of Plaintiffs' Petition	13
The Defendant's Answer	17
Exhibit A, Indian Deed Inherited Lands	36
Specifications of Error	41
Specifications of Error All Directed to Two Points	45
Argument	46
Supplemental Argument	99

Citations.

Act July 22, 1790, 1 Stat. 137	48
Act April 18, 1796, 1 Stat. 452	48
Act May 19, 1796	50
Act March 2, 1811, 2 Stat. 652	52
Act July 4, 1884, 23 Stat. 94	52
Act April 21, 1806, 2 Stat. 402	51, 52
Act March 30, 1902, 2 Stat. 139	50
Amended Rules and Regulations Indian Affairs, 1904	53
Avey vs. VanVoorhis, 42 Okla. 232	115
Avery vs. VanVoorhis, 140 Pac. 615	117
Bansel vs. Cardin, 261 Fed. 309	90
Bluejacket vs. Ewert, 265 Fed. 827	68
Bolles vs. Outing Co., 175 U. S. 262	80
Cambria Iron Co. vs. Ashburn, 118 U. S. 57	76
Connolly vs. Union Sewer Pipe Co., 184 U. S. 540	97
Deffenback vs. Hawke, 115 U. S. 402	76
Douglass vs. Bennett, 55 Miss. 680	117
Dunlap vs. Mercer, 156 Fed. 545	96
Dunlop vs. Mercer, C. C. A. 156 Fed. 552	104
Hagar vs. Wykoff, 39 Pac. 281	117
Johnston vs. So. Pac. Co., 196 U. S. 1	48

INDEX

Page

Johnson vs. Townley, Vol. 20, p. 486, Lawyer's C. D.....	110
Keitel vs. U. S., 211 U. S. 370, 395	80
Kerfoot vs. Merchants Bank, 218 U. S. 281	98
Logan vs. U. S., 144 U. S. 263	48
Mohr vs. Tulip, 44 Wis. 274	117
Murdock vs. Memphis, 20 Wall. 617	75
Sec. 462 R. S.	73
Sec. 463 R. S.	74
Sec. 885, Revised Laws Okla. 1910	112
Sec. 1782 (113 Penal Code 1910)	84
Sec. 2078 R. S.	64
Smyth vs. Fisk, 23 Wall. 382	76
Studebaker vs. Perry, 184 U. S. 258	90
Supp. R. S. Vol. 1, p. 67, Sec. 10.....	78
The Conqueror, 166 U. S. 110	48
The Conqueror vs. Stevenson, 215 U. S. 190.....	72, 73, 76
U. S. vs. Auffmordt, 122 U. S. 209	76
United States vs. Bowen, 100 U. S. 508	48, 72, 76
United States vs. Douglas, 190 Fed. 482	46
United States vs. Germaine, 99 U. S. 508.....	69, 74, 86
United States vs. Hirsch, 100 U. S. 33	48
United States vs. Hirsch, 196 U. S. 1	72
U. S. vs. Hitchcock, Lawyer's C. D. 51, p. 719	110
U. S. vs. LeBris, 121 U. S. 278	76
United States vs. Morris, 14 Peters, 464	48
United States vs. Noble, 237 U. S. 74	66
U. S. vs. Noble, 197 Fed. 292	95
United States vs. Reese, 92 U. S. 214	48
U. S. vs. Ryder, 110 U. S. 279, 240	76
U. S. Revised Statutes, Sec. 14, Act June 30, 1834.....	46, 48
United States vs. Stevenson, 215 U. S. 190	48
United States vs. Ryder, 110 U. S. 729	48
Victor vs. Arthur, 104 U. S. 498	48
Victor vs. Arthur, 104 U. S. 498	72

No. 173.

IN THE
Supreme Court of the United States

PAUL A. EWERT, APPELLANT,

VS.

**CARRIE BLUEJACKET, A WIDOW, ET AL.,
APPELLEES.**

**ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.**

**STATEMENT, BRIEF AND ARGUMENT OF
APPELLANT.**

STATEMENT.

We accept, with some additions, the statement of the case as set forth by the United States Circuit Court of Appeals as a preface to the decision in this case in that court, 265 Federal Reporter, pp. 823-25. That statement is as follows:

"The appellants (hereinafter called plaintiffs) brought suit to cancel a conveyance of land in Ottawa, Okla., made by them to appellee (hereinafter called defendant). From a decree dismissing the bill this appeal is prosecuted. The land had been allotted to Charles Bluejacket, an Indian of the Quapaw Tribe, under the provisions of the Act of Congress, of March 2, 1895 (28 Stat. 876, 907), and a patent had been issued to him, containing a restriction upon aliena-

tion within 25 years from its date. Charles Bluejacket died intestate in 1907, leaving as his heirs the plaintiffs, and others, who are not parties to this suit. The conveyance to defendant by the widow, the adult heirs, and the guardians of the minor heirs, of Charles Bluejacket was executed on April 8, 1909, under the authority of that portion of Section 7 of the Act of Congress of May 27, 1902 (32 Stat. 245, 275; Comp. St. No. 4223), which reads as follows:

'That the adult heirs of any deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him may sell and convey the lands inherited from such decedent, but in case of minor heirs their interests shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the guardian, but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee.'

"The bill alleges as the grounds for setting aside the conveyance that the grantee was disqualified and prohibited by law from receiving the conveyance and that no report of the guardians' deed and sale was approved by the county court which had appointed them.

"Before the proceedings were taken for the sale of plaintiffs' lands, the Secretary of the Interior had adopted a set of rules and regulations applying to proposed sales of inherited Indian lands under the provisions of the statute last quoted, and compliance with them was a condition upon which his approval of any conveyance depended. These rules required that a minor heir's interest could only be conveyed by a guardian duly appointed by the proper court, and upon the order of such court, made upon a petition filed by the guardian, but all such conveyances were subject to the approval of the Secretary of the Interior. The owners of inherited Indian land who desired to sell it were also required to petition the Indian agent having charge of the territory wherein the land was situated asking to have the land sold in accordance with the rules of the Secretary, and agreeing that the proceeds of the sale should be placed in designated banks, and its withdrawal was subject to the approval of officers of the Indian department. The Indian agent, if satisfied that the facts alleged in the petition were sufficient, would file the petition and send a copy to the Commissioner of Indian Affairs. The agent was required to post in a conspicuous place in his office for the period of 60 days, a list of the lands, the names of the owners, and the dates when bids would be

opened. When any land had been posted for sale, it was the Indian agent's duty to view and appraise it, make a certificate of the appraisement, seal it, and not to open it until the date of sale. The appraisement was not to be made public either before or after the sale and no bid for less than the appraisal value was to be considered. No Indian agent nor any one connected with the agency office could prepare or assist in preparing the bid of any prospective purchaser. The bids were received in sealed envelopes, with the date marked thereon when they were to be opened. The right to reject any and all bids was reserved and the acceptance of all bids was subject to the approval of the owner of the land. Lands not disposed of at the appointed time could, if the owner so desired, be relisted and offered for sale after 30 days' advertisement, under the same rules that governed their original listing. The Commissioner of Indian Affairs was required to advertise in some local paper of general circulation near the lands the proposed sale of lands and inviting bids therefor, and a list of the lands offered for sale was also to be published in the weekly edition of the newspaper of widest circulation in the county where the lands were situated.

"The deed of conveyance was required to be submitted for the Secretary's approval, accompanied by the original petition, the appraisement, all bids, checks received to apply on payment, a report by the agent of all proceedings prior to the execution of the deed, together with a certificate from the agent that the deed was fully explained to the grantors, that the consideration was the fair price for the land, and that the conveyance was free from fraud and deception. The purchase price in no case was to be paid to the grantors, but deposited in a bank, or paid to the Indian agent, for the benefit of the grantors, when the Secretary should have approved the deed. Affidavits of grantors and grantees were required with the deed, showing that there was no contract, agreement or understanding, oral or written, for the refunding of any of the consideration money to the purchaser, or for the exchange of any property in lieu of the consideration money. The grantee's affidavit was also required to the effect that he was not a party to any association of persons to acquire such lands at less than their fair value, or to prevent open and fair competition in the purchase; that the contract was not procured by false representations to the grantor, or suppression of facts as to the value of the land or any other feature of the transaction; and that neither the grantor nor any person for him had been given or promised any money or thing of value, except the consideration, to induce him to agree to the sale of his land. The form of deed was also prescribed by the rules.

"The plaintiff in June, 1908, filed a petition with the Indian agent for the Quapaw Tribe praying for the sale of these lands and agreeing to be bound by these rules governing the sale of such lands. The lands were listed for sale and the time for opening bids fixed for August 17, 1908. An appraisal was also made. This appraisal was kept secret until after the execution of the deed, its approval by the Secretary of the Interior and its delivery to defendant.

"Early in July, 1908, petitions were filed with the county court of Ottawa County by the guardians of those of the plaintiffs who were then minors, praying for authority to make sale of the wards' shares in the lands and to join with the other heirs in such sale. The adult heirs waived notice of the hearing upon these petitions and on July 17 orders were entered by the county judge authorizing the guardians to sell the minors' shares according to the rules prescribed by the Secretary of the Interior, and directing a report of the guardians' proceedings under the order. It seems to be conceded by counsel that the proceedings leading up to the deed were substantially as now recited. At the first date fixed for opening bids, one Hughes presented a bid for the lands of \$4,000, which was rejected as below the appraised value. The lands were offered a second time, but at the time fixed for receiving bids, September 1, none had been received. The lands were offered a third time, but at the time fixed, October 26, no bids were received. The lands were again offered for the fourth time on November 27, but no bids were received. Bids were invited for the fifth time, and on December 21, the defendant filed a bid of \$4,000, which was rejected as below the appraised valuation. At the sixth offering of the lands, on January 25, 1909, the defendant filed a bid for \$4,680, which was again rejected as below the appraised valuation. At the seventh offering of the lands on February 22, 1909, the defendant bid \$4,000, for a portion of the lands, but this bid was rejected. The lands were again offered for the eighth time on March 29, 1909, and the defendant's bid of \$5,000, was accepted. The deed to the defendant was then executed in April, 1909. It was approved by the Secretary of the Interior on July 26, 1909, delivered to defendant and recorded, and defendant took possession some time afterward."

In order that the court may at the very beginning understand the facts as disclosed by the evidence, the above statement should be further supplemented as follows, to-wit:

That on October 23rd, 1908, now more than thirteen years ago, the defendant in the lower court, Paul A. Ewert, was appointed a special assistant to the attorney general of the United

States to assist as an attorney in the institution and prosecution of certain suits "to set aside certain deeds" made to certain allotments in Quapaw Indian Agency. His letter of appointment was in the following words and language, to-wit (Rec. p. 26):

"Department of Justice, Washington, D. C.,
October 23, 1908.

Paul A. Ewert, Esq., Pipestone, Minnesota.

Sir:

You are hereby appointed a Special Assistant to the Attorney General to assist in the institution and prosecution of suits to set aside deeds made to certain allotments in the Quapaw Indian Agency.

Your compensation will be at the rate of per month, commencing when you enter upon duty, at which time you should execute and forward the necessary oath of office.

Your official residence is fixed at Miami, Oklahoma, and when absent from that place on official business you will be allowed your actual necessary expenses of lodging and subsistence, and your actual traveling expenses, as provided by the Department's orders dated September 1, 1907, a copy of which is herewith enclosed.

This appointment is subject to any change which may be made by this Department.

Respectfully, (Signed) Charles J. Bonaparte,
Attorney General."

It will be noticed from the above that this appointment was special, to do special work and was of limited duration and at any time subject to change. It was an employment by the month, and the testimony further showed that Ewert had the right to take on such additional business along the lines of his profession, as he might choose, without doing an injustice to his service in behalf of the United States. Ewert took the oath of office on the 10th day of November, 1908, going to Washington, D. C., and then to Miami, Oklahoma, where he did assist in the institution and prosecution of certain suits to set aside certain deeds theretofore made, by order of the Territorial Court of the United States in the Oklahoma district.

The evidence further discloses that during the times with which we are concerned in this suit, his employment was neither enlarged nor diminished, nor was the character of it changed. The evidence further discloses that the suits instituted were not

concerning lands of the Quapaw Tribe of Indians, but affected certain allotments of inherited Indian lands belonging to Ottawa and Wyandotte Tribes making up a part of what was designated as the Seneca Indian Agency.

Ten months before Ewert's appointment, and approximately eleven months before he arrived in Oklahoma, the heirs of one Charles Bluejacket, a Quapaw Indian allottee who had received his patent in fee simple from the United States with a restriction upon alienation for the period of twenty-five years, instituted certain probate proceedings in the County Court of Ottawa County, Oklahoma, for the purpose of having the heirs of Charles Bluejacket determined and guardians appointed for the minor heirs, with a view to selling said lands under and pursuant to the Act of Congress of May 27, 1902, *supra*, providing for the sale of inherited Indian lands by the Secretary of the Interior of the United States. Those rules and regulations are found on pages 39 to 46 inclusive, of the record in this case.

Early in July, 1908, five months before Ewert's appointment as Special Assistant to the Attorney General of the United States, the probate proceedings having been completed, these adult heirs of Charles Bluejacket, deceased, and the minor heirs, through their guardians, petitioned the Secretary of the Interior for the sale of said inherited Indian lands. The evidence further discloses that Ewert never saw any of the Indians or had any conversations with any of them or had any business dealings with them, or in fact had any personal acquaintance with them at all. His dealings were entirely with their guardian, The United States of America, through the Secretary of the Interior. Ewert in his capacity as Special Assistant to the Attorney General was appointed solely for the purpose of instituting certain law suits. He was employed in a legal capacity—not in Indian affairs. The suits which he was directed to prosecute at that time and those which he afterwards instituted were brought in the name of the United States, not the name of the Indian allottees, and were based upon the condition of the records in the office of the Register of Deeds of Ottawa County, Oklahoma. Ewert had no duties of any kind which would in any wise necessarily bring him into personal contact with the Indians. In 1910 the office itself was moved to Joplin, Mo. The government did not consult the Indians as to whether or not said suits should be instituted, but took the record as its basis of information, and purely on questions of law, instituted the suits to set aside certain deeds.

The record further discloses that Ewert saw posted in public places advertisements of the United States offering these Indian lands for sale. Ewert was not connected with the Indian Office; he had nothing whatever to do with the sale of those lands; the lands were first petitioned to be sold months and months before he was ever appointed to his position; the lands were secretly appraised months and months before he was appointed, and were offered for sale on printed posters, as required by the rules and regulations. Seeing those posted bills, and without any other relation of any kind with the Indians, without even seeing them or talking with them, and without being acquainted with them, he filed his sealed bids in the office of the Secretary of the Interior, or his agent, the Superintendent of Wyandotte, Oklahoma, and the lands were sold in the manner as set forth in the opinion of the court hereinbefore quoted. Ewert's bid was by one thousand dollars the highest bid ever made for the lands in question. Before the deed was approved Ewert made known to both the Secretary of the Interior and the Attorney General of the United States the fact that he had bid upon those lands, and both the Secretary of the Interior and the Attorney General of the United States and his action was approved by both. The evidence discloses that Attorney General Wickersham told Ewert that he had a perfect right to bid upon the lands, and that the Secretary of the Interior approved this sale made by the Government to Ewert in behalf of its wards, the Indian grantees, with full knowledge of Ewert's employment, and of all the facts hereinbefore related.

For this he stands and is judged in this court for a violation of the law by a civil action brought in this suit in the name of the heirs of Charles Bluejacket, deceased, at the procurement of certain attorneys whose names are attached to the petition. An old statute that was enacted eighty years ago is resurrected for the purpose of showing, first, that Ewert was employed in Indian Affairs, and second—that he was disqualified from receiving the deed in question by virtue of the provisions of that section which is now Section 2078 of the Revised Statutes and reads as follows:

"No person employed in Indian affairs shall have any interest or concern in any trade with the Indians except for and on account of the United States, and any person offending herein shall be liable to a penalty of five thousand dollars and shall be removed from his office."

The evidence further discloses the fact that notwithstanding the allegations in the petition, the plaintiffs through their attorneys offered no evidence whatever to substantiate the charges contained in the petition intimating that there was fraud in the transaction, etc. Not one single word of evidence was adduced in that respect, and the case was tried solely upon the admissions of Ewert that he was employed after the manner and fashion under the terms of his employment as defined by the letter hereinbefore set forth. All the dealings that he had were with the United States. He purchased the land of the United States through the office of the Secretary of the Interior. He paid the money to the United States, and both the Attorney General and the Secretary of the Interior then declared that he had a right to purchase under the law in the manner in which the purchase was made, and this has been the ruling of all subsequent Secretaries of the Interior and Attorneys General of the United States.

This court should not be misled by the allegations of the plaintiffs' petition as was the intent of plaintiffs' counsel, for the evidence discloses the fact that it was filed maliciously and with an evil intent for the express purpose of doing Ewert a wrong.

It evidently was the intent and purpose of the counsel for the plaintiffs to prepare a petition which should at once bring Ewert under the condemnation of the court, by alleging maliciously and wilfully many matters which they either knew or should have known from the public records were untrue. It evidently was their purpose to lead the defendant, Ewert, into a trap, under the belief that he would file a demurrer or motion to dismiss, thus leaving those maliciously false statements unchallenged. Ewert was not misled, and did not fall into the trap, but made direct answer. The record shows that the trial court, Honorable Ralph E. Campbell, wished to dismiss the cause upon the petition, but that Ewert begged the court for the opportunity of compelling the plaintiffs to prove the allegations contained in their petition or themselves stand charged with conduct unbecoming members of the bar. The court granted this request and plaintiffs were put upon their proof, but they offered no witnesses in support of any of the malicious allegations of fraud or conduct upon the part of Ewert unbecoming a member of the bar or a public official.

In order to direct some of these things to the attention of the court the appellant now gives the petition in full with such comments at the close of each paragraph thereof as shall readily direct the attention of the court to these matters:

The Petition of the Plaintiffs.

Paragraphs I, II, III and IV (Rec. 2, 3, 4), set up venue and jurisdictional facts and allege the allotment of the lands here in question to Charles Bluejacket, a Quapaw Indian, under the allotment act, giving these lands to the allottee in fee simple, with the restriction upon alienation for the period of twenty-five years and the issuance of such a patent therefor.

In paragraph IV of plaintiff's petition, the following allegations are made (Rec. 4, 5):

"Plaintiffs state that the defendant, Paul A. Ewert, was on the 8th day of April, 1909, and for a long time prior and subsequent thereto by commission duly issued under the laws of the United States, a Special Assistant Attorney General of the United States, and specially directed and commissioned by the Honorable George Wickersham, then Attorney General of the United States, to act as such Special Assistant Attorney General in and for the Quapaw agency of the State of Oklahoma, and to enforce and require due observance by all white persons having dealings with the Indians of the Quapaw agency of the Acts of Congress enacted for their—said Quapaw Indians'—benefit; that it was the special official duty of the said special assistant Attorney General to protect any allottee or the heirs of any allottee holding allotted and restricted lands, in the holding and disposition of their said land and to protect and enforce and compel due obedience to and observance to the guardianship of the United States over allottees on their heirs and their lands located in said Quapaw agency, and that said Paul A. Ewert, as such special assistant Attorney General of the United States, kept an office in the City of Miami for a long time prior and subsequent to the 8th day of April, 1909.

"That the said Paul A. Ewert, with great pains, caused it to be circulated among the Indians of the said Quapaw agency that he was such special assistant Attorney General to Attorney General Wickersham, and that he was charged with the duties and obligations of protecting the rights of the Indians under tutelage and guardianship of the government of the United States, and that he would compel strict observance of

the rights of said Indians to the end that no unfair advantage should be taken of them, or any thereof, by white men dealing with them in and for their lands. That the said Paul A. Ewert caused to be circulated among the Indians the fact that he required a great many white men to yield up and cancel farm and mining leases held on Indian lands, and that he was keeping special watch and observation over all dealings for land with said Indians, and assumed the position of attorney for all Indians of the Quapaw agency in all matters relating to their allotted lands or to their rights as allottees or heirs of allottees to lands located in said agency.

"That these plaintiffs had been informed of all these claims of authority by the said Paul A. Ewert, and of the position which the said Paul A. Ewert occupied as special assistant Attorney General of the United States, and of his power and authority and by reason of said facts, the said Paul A. Ewert acquired great influence over the Indians of the Quapaw agency and particularly over the plaintiffs herein."

COMMENT.

The evidence adduced, and the public records show that Ewert was appointed by the Attorney General of the United States under the following commission (Rec. p. 26):

"Sir:

You are hereby appointed a special assistant to the Attorney General to assist in the institution and prosecution of suits to set aside deeds made to certain allotments in the Quapaw Indian agency.

Your compensation will be at the rate of per month, commencing when you enter upon duty, at which time you should execute and forward the necessary oath of office.

Your official residence is fixed at Miami, Oklahoma, and when absent from that place on official business, you will be allowed your actual necessary expenses of lodging and subsistence, and your actual traveling expenses, as provided by the department's orders, dated September 1, 1907, a copy of which is herewith enclosed.

This appointment is subject to any change which may be made by this department.

Respectfully,

(Signed) CHARLES J. BONAPARTE,
Attorney General."

This letter of appointment is a matter of public record, and at least one of the attorneys for the plaintiffs had a copy of it in his possession at the time the petition was filed in this suit.

There is no evidence to show that Ewert's duties were enlarged until long after, or that he brought any suits concerning Quapaw matters until long after the lands were purchased and the deed approved.

Paragraph V of Plaintiffs' Petition.

Paragraph V of plaintiffs' petition alleges the following (Rec. 5, 6):

"Plaintiffs aver that in the early part of the year, 1909, these plaintiffs and other said heirs, acting in their own behalfs as audits, and through their respectively appointed guardians, petitioned the Indian agent located at Wyandotte, Oklahoma, having jurisdiction over the Indians and their lands of the Quapaw agency, to cause the above described lands to be advertised for sale; that the said lands were duly advertised for sale to the highest bidder under such rules and regulations as the Secretary of the Interior had promulgated, and that on or prior to the 8th day of April, 1909, said lands were sold to the defendant herein for the sum of five thousand dollars, and that the said Paul A. Ewert was the successful bidder, and said land was sold to him, the said Paul A. Ewert, for the sum of five thousand dollars, and that the bid of said Paul A. Ewert was the sole and only bid offered, and that the money was paid in the sum of five thousand dollars to the said Indian agent for the benefit of these plaintiffs and the other grantors in said deed.

"That said deed was submitted to the Honorable Secretary of the Interior, and was by him approved on July 26, 1909, and that said deed was thereafter recorded in the office of the county clerk of Ottawa County, Oklahoma, in book 9, page 505, a true copy of said deed being hereto attached, marked Exhibit "B" and made a part of this petition.

"These plaintiffs further aver and say that at the time this land was sold, the same was appraised by the Indian agent, but that such appraisement was not made public, and that these plaintiffs do not know, nor did not know at the time of the execution of the deed what the amount of such appraisement was.

"These plaintiffs further state that at the time of the offering of said bid by said defendant, Paul A. Ewert, said Paul A. Ewert was acting in the capacity aforesaid, as special assistant Attorney General of the United States of America, and that said lands at such time were of the reasonable value of ten thousand dollars, and that these plaintiffs did procure a purchaser for said land who was ready, able and willing

to purchase the same for the sum of ten thousand dollars, and that there were other prospective purchasers that knew the land and that were willing to bid for the purchase of same as much as ten thousand dollars, and these plaintiffs state that the said Paul A. Ewert, in violation of his duties as imposed by his special employment, and being then and there in the employ of the United States in Indian affairs in the Quapaw agency of Oklahoma, where said lands were located, did discourage said bidders by telling them that the lands were not worth the amount that they were offering to pay, and that there were various conflicting mining leases on said land, and that litigation was going to arise by reason of such mining leases, and that it would be ten years before said land was free from litigation and clear of all mining claims thereon, and that in truth and in fact there were no valid mining leases on said land, and that there were no persons in possession of said ground claiming any mining rights thereon and that this defendant well knew these facts.

"That said bidders, by reason of such statements and conduct on the part of said Paul A. Ewert, made no bid on said land and said Paul A. Ewert, as a result thereof, became the purchaser of said land for the sum mentioned; that the said Paul A. Ewert, defendant herein, by reason of his employment by the United States and as an officer thereof, engaged in Indian affairs, and particularly in the Quapaw agency of Oklahoma, was incompetent to purchase, and was prohibited from purchasing said land and dealing with said Indians in any way whatsoever."

COMMENT.

In the first section of this paragraph, counsel falsely aver that their clients in the early part of the year, 1909, petitioned the Secretary of the Interior to sell these lands. This is false, as shown by the evidence, which are matters of public record in the Indian office, and which, if not maliciously alleged, was carelessly done with the intent and purpose of making it appear that these heirs petitioned the Secretary of the Interior to sell said lands after Ewert's said appointment. They had access to the public records in the Indian office at Washington and at Wyandotte, Oklahoma, in the county where they live. Those records, as shown by the evidence in this case, disclose the fact that probate proceedings were first instituted in the County Court of Ottawa County, Oklahoma, by these heirs early in January, 1908, more than ten months before Ewert's appointment to office (Rec. 131).

In the second section of said paragraph V they recite that the deed was approved by the Secretary of the Interior, and in this connection, attention of the court is directed to the error appearing at the top of page 14, of the Record where this deed is set forth. It there appears that it was recommended that the deed be *dis*-approved. This must be an error, because the allegation of approval as made by the plaintiffs is correct.

The last section of said paragraph V, charges that the said lands which Ewert purchased for five thousand dollars, although appraised at only four thousand dollars, was of the reasonable worth and value at the time of the purchase of ten thousand dollars, and that the plaintiffs knew it was worth that amount of money and that they had procured a purchaser for said lands who was willing to pay that amount for them, but that Ewert saw these purchasers and discouraged them from bidding on the land, and that therefore they did not put in any bid.

These allegations are maliciously false and untrue, and they were known to be so by counsel when they inserted them in the petition. The plaintiffs at the trial did not offer or attempt to offer one single line or word of testimony in substantiation of that allegation.

Paragraph VI of Plaintiff's Petition.

Paragraph VI of the petition is as follows (Rec. 6. 7. 8):

"Plaintiffs aver that it is the policy of the government of the United States to discourage alienation by Indians in the Quapaw Agency of their lands received by them as their allotted lands and as the heirs of allottees and not permit any sale of the lands by Indians except when the necessity of the Indian holder demands such sale, and when it is for the best interests of such Indians, and then only for the fair and reasonable market value of said allotments, and to that end the Acts of Congress forbid any sale of allotted lands by Indians of the Quapaw Agency except under the supervision and care of the Secretary of the Interior, and that it was the duty of the said Paul A. Ewert as special assistant to the Attorney General of the United States to respect, uphold and enforce said policy, and that by reason of such policy and such Acts of Congress and by reason of the aforesaid official position of the said Paul A. Ewert he was wholly disabled and prohibited from acquiring the title to plaintiffs' land by such purchase, directly or indirectly, and that by the purchase aforesaid and the taking

possession of said land Paul A. Ewert, by his own wrong, became the holder of said lands in trust for these plaintiffs.

"Plaintiffs aver that it was the duty of the defendant Paul A. Ewert, as the Special Assistant Attorney General of the United States, charged with enforcing the laws for the protection of the Indians of the Quapaw Agency, to inform the Secretary of the Interior of the real value of the aforesaid land, and that said Paul A. Ewert well knew that said land was of the value of fifty dollars per acre, and well knew that there were purchasers ready, able and willing to pay the sum of fifty dollars per acre for said land, but that said Paul A. Ewert, in violation of the said duty, failed to so inform the said Secretary of the Interior and that the said Secretary of the Interior, at the time he approved the aforesaid deed, was wholly ignorant of the fact that said land was of the value of fifty dollars per acre of ten thousand dollars, and wholly ignorant of the fact that there were purchasers ready, willing and able to pay ten thousand dollars for said land.

Plaintiffs further state that said defendant, after said deed was duly approved, entered into the possession of said land, and has since occupied the same; that all of said land is in cultivation, being rich bottom land with the exception of about ten or fifteen acres, and that a valuable lead and zinc mine has been opened on said land, and it has been mined for some time by this defendant through his lessees, and, that this defendant has taken large sums of money therefrom as his royalty upon the sales of ores mined therefrom, and that said land is located in the mineralized belt, and that a fair and reasonable market value of said land at the present time would be not less than fifteen thousand dollars, and these plaintiffs further aver that the said defendant has had possession of said land for farming purposes for and during the period of time since July 29, 1909, and that a reasonable farm value thereof is the sum of four hundred dollars per year.

Plaintiffs aver that on the 20th day of December, 1919, said defendant mortgaged the land so acquired from these plaintiffs to Lillias Barrowman to secure the payment of the sum of thirty-five hundred dollars borrowed from said mortgagee on said land, and that the said mortgagee now is the holder in good faith and for value of said mortgage and note, and that the same constitutes a mortgage lien upon the plaintiffs' aforesaid interest thereon.

These plaintiffs further state that at the time of the execution of the said deed, William Bluejacket, Blanche Bear, formerly Blanche Bluejacket, Amy Bluejacket and Clyde Bluejacket, were minors, the said Carrie Bluejacket being their guardian, duly appointed by the county judge of Ottawa County, and that said Cora Arnett, then Cora LaFalier, and Louis

Pascal were at said time minors, and their guardian was L. A. LaFolier, duly appointed by the county judge of Ottawa county, Oklahoma, and that said deed purports to have been signed by said guardians for and in behalf of these minors.

These plaintiffs aver and state that at no time were said guardians authorized by said court to sell the interests of said minors in said land, and said county court never caused said interests of said minors to said land to be appraised as required by the statutes of the state of Oklahoma, and as a fact there was no attempt made on the part of said guardians to comply with the statutes of the state of Oklahoma regarding the sale of lands of minors, and that said deed and sale has never been reported to said county court and has never been approved by said county court, and that by reason thereof said deed is absolutely null and void in so far as it attempts to convey the interests of said minors in said land."

COMMENT.

The first section of said paragraph VI makes certain allegations with respect to the policy of the government and contains statements which are fabrications of facts and not deducible from the Act of Congress authorizing the heirs of deceased Indian allottees to sell their inherited lands. The policy of the government was and is to permit the Indians to sell these inherited lands, provided the sales were made through the Secretary of the Interior and the moneys retained by the Secretary to be disbursed by him as he saw fit.

The second section of paragraph VI contains an averment as to the duties of Ewert to inform the Secretary of the Interior as to the value of the lands, etc. If the court will refer to the rules and regulations promulgated by the Secretary of the Interior which are attached to the defendant's answer and in the printed record, pages 39-46, it will readily discern how illogical and untrue, if not maliciously false, are those allegations. The rules and regulations provide that after the heirs petition the Secretary of the Interior to sell their lands for them, the Secretary must himself appraise said lands and that appraisement is made in secret and filed away and no one knows what it is.

It further appears from the record, and the attorneys for the plaintiffs well knew those facts or by inquiry might have obtained them, that the land was petitioned for sale by the heirs and was appraised months before Ewert was appointed to office, and that they

knew from the letter of appointment, which was a matter of public record and which was in possession of counsel for plaintiffs, that Ewert had nothing whatever to do with the Indians, and was only hired at a stipulated salary per month with the right to do other legal work on his own account, which right Ewert expressly reserved by verbal contract, to institute certain suits for the government.

The court did not permit the plaintiffs to offer any testimony under their allegations, holding that it was the duty of the Secretary of the Interior to fix the appraised price of the land, and that it must be presumed that the Secretary of the Interior had full knowledge of the value of the land and that he did his full duty.

It appears also from the certified copy of the letter which the appellants claim now are in evidence that the Indian agent made a several-page report, answering thirty or forty questions, telling just exactly what the character of the land was, its nearness to possible mineral productions, its value for agricultural purposes, and everything complete.

As to the allegations contained in the second section of said paragraph VI, the testimony shows that all of the land was not rich bottom land with the exception of ten or fifteen acres; that it, in fact, contained only ninety acres of land in cultivation, as shown by actual measurement; that there were no valuable lead and zinc mines on said land.

The fourth section of said paragraph alleges that while guardians had been appointed for the minor heirs, that the said guardians were at no time authorized by the probate court to sell the interests of said minors in said land, and that the county court never caused said interests of said minors to be sold, and that the sale had never been reported to the county court and had never been approved by it.

It must be believed that these allegations were all maliciously false, for it cannot be believed that these attorneys insisting a suit of this character could go to the records and find out from those records that guardians had been appointed for the several minors and not in those same files find that the law had been complied with in every respect; that petitions had been filed as required by the Act of 1902, asking for the sale of said land by the Secretary of the Interior; that orders of sale had been made, and that the guardians of said minors under those orders were permitted by the county court, in accordance with the laws of the State of Oklahoma

and of the United States of America, to petition the Secretary of the Interior to sell their interest in the lands in question, and that the order of sale was made, and the sale made by those guardians was reported back to the county court for its approval.

Upon the trial the defendant subpoenaed the proper officers of the county court, and these records from said court were brought into evidence. When this became apparent, Judge Campbell made them "digest the venom of their spleen" and compelled the attorneys for the plaintiffs to themselves offer these very county court records in evidence (Rec. pp. 115 and 142 to 152, inclusive).

The Defendant's Answer.

Counsel for the defendant Ewert believe that it was necessary in setting up the plaintiffs' petition to make the explanations after each paragraph found therein, in order that the court might understand why the defendant filed answer in the manner and language in which it appears.

The defendant's answer is as follows (Rec. 14 to 46, inclusive):

"I.

The defendant, for his answer to the allegations contained in paragraph I of said complaint, says that he is without knowledge as to whether each of the said plaintiffs, or any of them are residents of the Eastern Division of the United States District Court sitting in and for the State of Oklahoma, and therefore demands proof of the same.

II.

Defendant, for answer to the allegations contained in Section 2 of paragraph II of said complaint, says that he is without knowledge as to whether or not the said Charles Bluejacket died intestate in the month of May, 1907, leaving the heirs named, with their relationship to the deceased as named in said complaint, and demands proof of the same, but admits that the said Charles Bluejacket died on or before the 1st day of January, 1908.

Defendant, answering the second section contained in paragraph II of said complaint, says that he is without knowledge as to whether or not William Bluejacket is dead, and if he is dead, whether he died intestate without marriage or issue living, leaving only his mother, Carrie Bluejacket. as his only heir.

Defendant, answering the third section contained in paragraph II of said complaint, admits that he is a citizen of the State of Missouri and resides in the City of Joplin, Jasper County, State of Missouri, but denies the allegation that 'this suit involves a construction of the Acts of Congress restricting the rights of Quapaw Indians for alienating lands severally allotted to Quapaw Indians, and the Acts of Congress enacted for the protection of the Indians,' are true.

III.

Defendant, for answer to the first section of paragraph III of complainants' complaint, admits the allegations thereof that the said Charles Bluejacket was allotted certain lands described in said paragraph III of said complaint, but is without knowledge as to whether the Exhibit 'A' attached to said complaint is a true and correct copy of said patent.

Defendant, for answer to the second section of said paragraph III, admits that the lawful heirs of Charles Bluejacket, deceased, upon his death, entered into the possession of the lands described in the complaint and that they retained the full possession and enjoyment thereof until the 8th day of April, 1909, and for some time thereafter through their lessees, but denies the allegation of law set up in the last two lines of said paragraph III.

IV.

Defendant denies the allegation contained in the first eight lines of paragraph IV of said complaint, which alleges that 'the defendant Paul A. Ewert was on the 8th day of April, 1909, and for a long time prior and subsequent thereto, by commission duly issued under the laws of the United States, a Special Assistant Attorney General of the United States, and specially directed and commissioned by the Honorable George Wickersham, then Attorney General of the United States, to act as such Special Assistant Attorney General in and for the Quapaw Agency of the State of Oklahoma.'

Further answering said Section 1 of paragraph IV of said complaint, defendant admits that he, as Special Assistant Attorney General of the United States, kept an office in the city of Miami, Oklahoma, from on or about the 1st day of December, 1908, until the 11th day of August, 1910, but expressly denies the allegations that it was his duty to 'enforce and require due observance by all white persons having dealings with the Indians of the Quapaw Agency of the Acts of Congress enacted for their—said Quapaw Indians'—benefit; and denies that 'it was the special official duty of said Special Assistant Attorney General to protect any allottee or the heirs of any allottee, holding allotted and restricted lands, in the holding

and disposition of their said land, and to protect and enforce and compel due obedience to and observance of the guardianship of the United States over allottees or their heirs and their lands located in said Quapaw Agency.'

Further answering, defendant alleges that the said allegations are irrelevant and redundant matter and not properly a part of the complaint herein, and asks that the same be stricken out and no testimony be permitted to be offered in proof and substantiation thereof.

Defendant, further answering the remaining sections of said paragraph IV, shows to the court that the said allegations of such irrelevant and redundant matter are inserted in said complaint with sinister purpose and for sinister motives, and asks that this court strike out the same for said reasons, and that it does not permit complainants to offer any proof in substantiation of the same, upon the ground that said allegations are irrelevant and redundant and immaterial and not properly a part of the pleadings in this case. Defendant denies specifically each of the said allegations contained in said paragraphs, and denies that he circulated, or caused to be circulated, the reports therein alleged, and denies that he 'assumed the position of attorney for all Indians of the Quapaw Agency in all matters relating to their allotted lands or to their right as allottees or heirs of allottees of lands located in said agency. And denies that he assumed to act, or did act, in any other capacity than as authorized by the letter of appointment hereinafter referred to in this answer, and denies that he obtained great authority over the complainants in this action by reason of his said appointment, because prior to the execution and delivery of the deed mentioned in said complaint he had absolutely no acquaintance with the said complainants and never conversed with them about any Indian matters of any kind.

V.

Defendant, further answering the complaint herein, and particularly the allegation contained in paragraph V thereof, denies that "in the early part of the year 1909 these plaintiffs and other said heirs acting in their own behalf as adults, and through their respectively appointed guardians, petitioned the Indian agent (locate) at Wyandotte, Oklahoma, having jurisdiction over the Indians and their lands of the Quapaw Agency, to cause the above described lands to be advertised for sale,' but admits and alleges in answer to said allegation that the said heirs, on or about the 20th day of July, 1908, did petition the Secretary of the Interior of the United States of America to sell the said lands under and pursuant to Section 7 of the Act of Congress approved May 27, 1902 (32 Stats. 205-275), and in conformity with the rules and regulations

promulgated thereunder by the said Secretary of the Interior and by him approved September 19, 1907; and that they filed said petition, duly made in conformity thereto, with Ira C. Deaver, the superintendent and special disbursing agent of Quapaw Agency, having jurisdiction of said lands; and defendant admits that the said lands were duly advertised for sale to the highest bidder under the said Act of Congress and the rules and regulations promulgated by the Secretary of the Interior, and admits that on the 8th day of April, 1909, the said lands were sold to the defendant herein for the sum of five thousand dollars (\$5,000), and admits that the said defendant Paul A. Ewert was the successful bidder and that said lands were sold to him in accordance with the said Act of Congress and the rules and regulations promulgated thereunder, for the sale of inherited Indian lands, by the Secretary of the Interior of the United States of America, but denies that said sum of five thousand dollars (\$5,000) was paid to the Indian agent for the benefit of these complainants and the other grantors in said deed, but alleges that the said purchase price was paid to the Secretary of the Interior of the United States of America for their benefit, in accordance with the said Act of Congress and the rules and regulations providing for the sale of inherited Indian lands promulgated thereunder.

Defendant, for further answer, denies that he was the sole and only bidder at said sale, and alleges the fact to be that the said lands were first duly advertised for sale under said Act of Congress and the rules and regulations thereunder promulgated by the Secretary of the Interior some time prior to the 17th day of August, 1908. That the said lands were first offered for sale in the manner provided by law under date of August 17, 1908, at which time one Adelbert Hughes, who had caused said heirs to list said lands for sale in the first instance, did offer and bid the sum of four thousand dollars (\$4,000), and no more, for said lands, and that his said bid was rejected because it was under the appraised valuation of said lands.

That in accordance with the law and at the request of these complainants and the heirs of Charles Bluejacket deceased, the said lands were again offered for sale under and pursuant to said Act of Congress and the rules and regulations thereunder, and bids were opened thereon under date of September 1, 1908, at which time there were no bids for said lands.

That thereafter the said lands were for a third time under said Act of Congress and the rules and regulations promulgated thereunder offered for public sale to the higher bidder on October 26, 1908, and at that time there were no bids on said lands.

That thereafter, to-wit, on the 27th day of November, 1908, the said lands were for a fourth time offered for public sale to the highest bidder under and pursuant to the Act of Congress and the rules and regulations promulgated thereunder, but same was not sold, because there were no bids received.

That thereafter, to-wit, on the 12th day of December, 1908, the said lands were for a fifth time offered for public sale to the higher bidder, under and pursuant to the Act of Congress and the rules and regulations promulgated thereunder, at which time the defendant, Paul A. Ewert made a bid on said lands of approximately four thousand dollars (\$4,000), which said bid was by the Secretary of the Interior rejected because it was under the appraised valuation.

That thereafter, to-wit, on the 25th day of January, 1909, said lands were for a sixth time offered for public sale to the highest bidder, under and pursuant to the Act of Congress and the rules and regulations promulgated thereunder, at which time the defendant Paul A. Ewert bid the sum of four thousand six hundred eighty dollars (\$4,680) for said lands, which said bid was rejected by the Secretary of the Interior because it was less than the appraised valuation of said lands.

That thereafter, to-wit, on the 22nd day of February, 1909, the said lands were for the seventh time offered for public sale to the highest bidder, under and pursuant to the Act of Congress and the rules and regulations promulgated thereunder, at which time the defendant Paul A. Ewert bid the sum of four thousand dollars (\$4,000) for one hundred sixty (160) acres of said land, to-wit: Lots one (1) and two (2) of the northeast quarter (N. E. $\frac{1}{4}$) of section five (5), township twenty-eight (28), range twenty-four (24) east, and the south one-half (S. $\frac{1}{2}$) of the southwest quarter (S. W. $\frac{1}{4}$) of section thirty-two (32), township twenty-nine (29), range twenty-four (24) east, which said bid was rejected by the Secretary of the Interior of the United States, for reasons unknown to this defendant, except that it did not cover all of the said lands offered for sale.

That thereafter, to-wit, on the 29th day of March, 1909, the said lands were again for the eighth time offered for sale by the Secretary of the Interior of the United States to the highest bidder, under and pursuant to said Act of Congress and the rules and regulations thereunder, and the defendant Paul A. Ewert bid therefor the sum of five thousand dollars (\$5000), which said bid was accepted by the said Secretary of the Interior of the United States of America and by the said heirs of the said Charles Bluejacket, deceased.

That thereafter, to-wit, on the 8th day of April, 1909, and on the 13th day of April, 1909, all of the said heirs joined in due form of law by themselves and by their duly and lawfully appointed guardians of said petitioning minors in the execution of a warranty deed wherein and whereby they conveyed to said defendant Paul A. Ewert, by a deed of warranty, all of the hereinbefore described lands; that said deed of warranty was by the said Ira C. Deaver, superintendent and special disbursing agent of Quapaw Agency, duly transmitted to the Honorable Secretary of the Interior of the United States of America for his approval, with the recommendation that it be approved.

That on the 19th day of July, 1909, the said deed was submitted to the Commissioner of Indian Affairs of the United States of America and by him on said date recommended to the Secretary of the Interior of the United States for his approval; that on the 26th day of July, 1909, the said deed was in all things approved by the Secretary of the Interior of the United States and returned to the Honorable I. C. Deaver, superintendent and special disbursing agent of Quapaw Agency, by the Secretary of the Interior of the United States to be delivered to the said defendant Paul A. Ewert, for (an) in behalf of the said Secretary of the Interior of the United States and the said grantors, the heirs of Charles Bluejacket, deceased, a copy of which said deed, together with all the indorsements thereon, is hereunto attached, marked Exhibit 'A,' and made a part of this answer.

That the said deed was by said defendant Paul A. Ewert accepted and thereafter, to-wit, on the 22nd day of September, 1909, filed in the office of the register of deeds of Ottawa County, Oklahoma, and there recorded in Book 9 on pages 505-506 of the records of said office.

Defendant, making further answer to the last paragraph on page 5 of said complaint, says that he has no knowledge as to whether or not the complainants herein and the heirs of Charles Bluejacket, deceased, knew what the appraised value of the (. . .) of said lands were, and puts complainants upon their proof of the same, but defendant further shows to the court that under the hereinbefore mentioned rules and regulations promulgated by the Secretary of the Interior, it is expressly provided that 'the appraisal *shall not be made public* either before or after the sale, and no bid for less than the appraised value shall be considered,' and defendant asks that the said paragraph on page 5 of the complaint be stricken out, upon the ground that the same is irrelevant and redundant, and that no testimony be received concerning the said allegations, upon the ground that the same is incompetent, irrelevant redundant and immaterial.

Further answering said paragraph V, defendant asks that all of that portion of the same found on pages 6 and 7, beginning with the words, 'these plaintiffs further state' and ending with the words, 'in any manner whatsoever' be stricken out, upon the ground that the same is irrelevant and redundant and immaterial, and that no evidence be received concerning the allegations therein, upon the ground that the same is incompetent, irrelevant, redundant and immaterial.

Defendant denies that he was acting in the capacity stated in said complaint, or after any manner of employment other than as hereinafter stated in the manner of his appointment, dated October 22, 1908, signed by Charles J. Boneparte, Attorney General of the United States.

Defendant denies that the lands were of the reasonable value of ten thousand dollars (\$10,000); denies that the complainants ever procured a purchaser for said lands who was ready, willing and able to purchase the same for the sum of ten thousand dollars (\$10,000), and denies that there were other prospective purchasers who were willing to bid for the purchase of said land as much as ten thousand dollars (\$10,000); defendant denies that he at any time ever discouraged any bidder by telling him that the lands were not worth the amount that they were offering to pay, and that there were conflicting mining leases on the land, or that litigation was going to arise by reason of the said mining leases, and alleges the fact to be that he never talked with any person, or persons of any description, anywhere, or at any time, prior to the purchasing of the said land concerning the same, and never knew, prior to his bidding on said land and purchasing the same, whether there were or were not other bidders.

Defendant, further answering states that it is true that the said lands were covered by numerous mining leases; that the royalties on said lands were sold; that the lands were leased in advance for agricultural purposes, and alleges the fact to be that there were persons in possession of said land and persons claiming the said land and mining the same at the time of the said purchase and for a long time thereafter, and that it was necessary for this defendant to institute suit to gain possession of said land for mining purposes; that he gained possession of said land for mining purposes several years after he purchased the same, and then only after a suit was instituted for the purpose of clearing the title to the said land and releasing it from the many mining leases upon it and from the sales of royalties.

Defendant denies that there were any bidders of any kind or character who were deterred from bidding upon said lands by reason of any conduct of any kind upon the part of said defendant, Paul A. Ewert, and alleges that the said defendant

Paul A. Ewert never knew or heard of any person who wanted to bid or who contemplated bidding upon the said land after he had bid on it.

Defendant denies the allegation contained in the last six lines of said paragraph V, that he, 'by reason of his employment by the United States and as an officer thereof, engaged in Indian affairs, and particularly in the Quapaw Agency of Oklahoma, was incompetent to purchase, and was prohibited from purchasing, said land, and dealing with said Indians in any way whatsoever.

VI.

Further answering the allegations contained in said complaint, and particularly in paragraph VI thereof, defendant shows to the court that all of the allegations contained in said paragraph VI are irrelevant and redundant and not within the issues of this case, and should be stricken out; and defendant further asks the court that no testimony be received in support of said allegations upon the ground that the same is incompetent, irrelevant and immaterial.

Further answering, said defendant denies that it is the policy of the Government to discourage the alienation by Indians of lands inherited by them, and alleges and charges the fact to be that under the law they are invited to make such sales at any time they so desire, under and pursuant to the provisions of said Act of Congress of May 27, 1902, *supra*, and alleges that the same was enacted for their especial benefit.

Defendant further denies that it was the duty of the said Paul A. Ewert, as Special Assistant Attorney General of the United States, in the capacity in which he was employed, to have anything whatever to do with the sales of Indian lands, or to (meddle) in them after any fashion, or to advise with the Secretary of the Interior or with the Indian agent, or with anyone else concerning them; that the matter of the sales of said lands was absolutely without the terms of his employment.

Defendant further denies that under the terms of his employment he was wholly disabled and prohibited from acquiring the title to complainant's lands made by purchase in the manner in which it was purchased, and denies that by virtue of said purchase he became the holder of said lands in trust for these complainants.

Further answering the last section of paragraph VI found on page 7 of said complaint, defendant denies that it was his duty to inform the Secretary of the Interior of the real value of said land, or to in any wise make any suggestions to the Secretary of the Interior concerning the method or manner of handling the same, by reason of the fact that the

statute prescribed the manner and method under which the said lands were to be sold.

Defendant denies that he knew that the land was of the value of fifty dollars (\$50.00) per acre, and denies that he knew that there were other purchasers of any kind or character willing and able to pay the sum of fifty dollars per acre for said land, and denies that in failing to so advise the said Secretary of the Interior of this fact he was violating any of the duties of his office, and denies that the Secretary of the Interior, at the time he approved the said deed, was ignorant of the real value of said land, and denies that there were any other prospective or contemplated purchasers at said sale, and, therefore the Secretary of the Interior could not have been so advised.

Defendant denies that after the said deed was approved he entered into the possession of said land and has since occupied the same, and alleges the fact to be that he did not enter into the possession of it until the crop year of 1910, by reason of the fact that the same had been leased for agricultural purposes and the money collected in advance.

Defendant denies that all of said land is in cultivation or ever has been, and denies that it is rich bottom land, with the exception of ten or fifteen acres, and denies that it is valuable for lead and zinc mining purposes, and denies that a valuable lead and zinc mine has been opened up on the land, and denies that this defendant has taken large sums of money therefrom as his royalty upon the sale of ores mined thereon; and further denies that said land is located in the mineralized belt; and denies that the fair and reasonable market value of said land at this time would be not less than fifteen thousand dollars (\$15,000); and further denies that this defendant has been in possession of said land for farming purposes for and during the period of time since July 29, 1909; and denies that the reasonable farm value thereof is the sum of four hundred dollars per year; and defendant alleges and charges the facts to be as follows: That only ninety acres of said land is bottom land and that at the time the defendant acquired same it was not rich bottom land and is not now rich bottom land, having been cultivated for nearly forty years, and being entirely worn out and incapable of raising a crop, and grown up with sprouts and shrubs and small trees; that eight acres of said land constitute a part of the bed of Spring River; that less than one hundred acres, all told, of said land can be cultivated and is tillable, although defendant has plowed up and put into cultivation every foot of said land capable of being cultivated; that twenty acres of said land is rocky meadow land and high and gravelly and raises but little, if any, hay; that the balance of said land is covered with rocks and scrub timber and cactus

and is absolutely worthless for any purpose whatsoever, and is not worth the amount of taxes levied annually against said land; and all of said land is not worth or of the fair value for farming purposes in excess of two hundred dollars per year.

Defendant admits that said land is located at the very east end of what is commonly known as the Lincolnville mining district, but denies that the land is of any value whatsoever for mining purposes. Defendant admits that some prospecting and mining operations have been carried on upon said land, and admits that he has received some royalty money therefrom, but charges the fact to be that he and his lessees have spent approximately fifty thousand dollars in trying to discover ore upon said land and endeavoring to mine the same, and by reason of such operations, have lost in excess of twenty-five thousand dollars, notwithstanding the fact that during the said prospecting period zinc ore has been at the highest price ever known in the history of the world, and defendant charges the fact to be that the land is absolutely worthless for mining purposes, and alleges that all attempts to mine said land have been abandoned.

Further answering said complaint, defendant shows to the court that both of the two paragraphs found on page 9, and up to the prayer for judgment, allege matters which are irrelevant and redundant and should be stricken out, and defendant objects to the introduction of any testimony tending to substantiate the same, upon the ground that the facts alleged are incompetent, irrelevant and immaterial and redundant.

Defendant admits that at the time of the execution of the said deed, Carrie Bluejacket was the duly and lawfully appointed guardian of all of said minors, except Cora LaFolier, now Cora Arnett, and Louis Pascal; and admits that L. A. LaFolier was duly and lawfully appointed their guardian, and admits that the said deed was signed by said guardians for and in behalf of their said wards and minors. Defendant denies the truth of the allegation that the said guardians were at no time authorized by the court to sell the interests of said minors, and admits that the said lands were not appraised under the laws of the State of Oklahoma, but were appraised as required by the laws of the United States under which said lands were sold, and denies the allegation that the said deeds and sale was never reported to said County Court; and denies that said deed is absolutely null and void in so far as it attempts to convey the interests of the said minors in said land; and alleges the fact to be that the said Carrie Bluejacket and L. A. LaFolier were, many months prior to the appointment of said defendant as Special Assistant Attorney General, duly appointed guardians of said minors, and that

months before the defendant was ever appointed such Assistant Attorney General, or came to the State of Oklahoma, they as such guardian petitioned the Probate Court of Ottawa County, Oklahoma, as required by the Act of May 27, 1902, for an order to sell the said lands in accordance with the laws of the United States, and that said order was in each instance granted and made by the said court, and said Secretary of the Interior under and pursuant to said order of sale, offered for sale the interests of their said wards in said lands under the laws of the United States, all of which happened months before the defendant was ever appointed to the position of Special Assistant to the Attorney General of the United States, and months before he ever came to the country or heard of, or knew that there were any Quapaw Indian lands.

VII.

Further answering, the defendant is constrained to say and show to the court that the persons whose names appear as plaintiffs in this suit are only nominally the plaintiffs; that the real plaintiffs are the persons who have signed their names to the complaint as attorneys, and certain of their clients, against whom the defendant instituted suits and proceedings in the courts of the United States while employed by the Department of Justice, and who were by the defendant then and more recently checkmated in their cunningly devised schemes to acquire certain Indian lands and mining rights by methods so unjust and so unconscionable as to call upon them the condemnation of every just man and woman to whom the facts became cognizant; and defendant alleges that this suit is brought by them in fulfillment of their threats to so intimidate the defendant as to deter him from *'future meddling in their affairs.'*

Defendant further alleges that the plaintiffs herein only permitted their names to be used as plaintiffs upon the solicitation and persuasion of these attorneys and their said clients and then only upon a contingent basis, which the defendant alleges is in direct violation of the spirit and letter of the laws of the State of Oklahoma, against champerty contracts and promotion of litigation.

And defendant further shows to the court that the allegations contained in the said complaint are so untruthful, particularly in things that are matters of public record, that the defendant is constrained to say that the same were inserted maliciously and with the intent to both injure the defendant and mislead the court.

VIII.

Further answering the complaint herein, defendant shows to this court that during the times mentioned in the complaint

he was in no wise, or after any manner or fashion, officially connected with, or in the employ of the Department of the Interior of the United States; that as a practicing attorney-at-law, he was specially employed by the Attorney General of the United States in only one respect, to-wit: To institute and prosecute certain suits to set aside certain deeds, commonly known as Marshal's Deeds, which had theretofore been unlawfully made by the United States Marshal under the direction of the Federal Court, unlawfully conveying the interests of heirs of deceased allottees in and to certain allotted lands located in Quapaw Indian Agency, and not otherwise, all as more fully appears by the letter of appointment under which the said defendant, Paul A. Ewert, was employed as Special Attorney of the Department of Justice, a copy of which said letter of employment, signed by Charles J. Bonaparte, Attorney General of the United States, is as follows:

Department of Justice,
Washington, D. C.

October 23, 1908.

Paul A. Ewert, Esq.,
Pipestone, Minnesota.

Sir: You are hereby appointed a Special Assistant to the Attorney General to assist in the institution and prosecution of suits to set aside deeds made to certain allotments in the Quapaw Indian Agency.

Your compensation will be at the rate of per month, commencing when you enter upon duty, at which time you should execute and forward the necessary oath of office.

Your official residence is fixed at Miami, Oklahoma, and when absent from that place on official business you will be allowed your actual necessary expenses of lodging and subsistence, and your actual traveling expenses, as provided by the Department's orders dated September 1, 1907, a copy of which is herewith enclosed.

This appointment is subject to any change which may be made by this department.

Respectfully,

(Signed) CHARLES J. BONAPARTE,
Attorney General.

Further answering, said defendant says that under the terms of said employment, and not otherwise, he took the oath of office on or about November 10, 1908; that he continued his said employment under the terms of said appointment and not otherwise, during the times mentioned in the complaint herein. That during the times mentioned in the complaint

when said land was purchased, his employment consisted solely of instituting suits to set aside certain deeds, and no other litigation of any kind was instituted by him during that period.

IX.

Defendant, for further answer to the complaint herein alleges and shows to the court :

That the lands here in controversy were allotted to Charles Bluejacket, an Indian of the Quapaw Tribe, under and pursuant to the Act of Congress approved March 2, 1895, being a part of the Indian Appropriation Act of the year, 1895 (28 Stat. at Large 927) providing for the allotment in severalty of the lands theretofore set apart for the use of the Quapaw Tribe or band of Indians, situated in Ottawa County, Oklahoma.

That prior to the 1st day of January, 1908, the said allottee, Charles Bluejacket, died, leaving as his heirs the persons named in the warranty deed, Exhibit 'A,' attached to this answer.

That on or about the 1st day of January, 1908, and nearly a year prior to the appointment of this defendant as Special Attorney for the Department of Justice, one Adelbert Hughes, a stranger to the defendant, who had theretofore acquired a mining lease upon the said lands and knew the value thereof, solicited the said heirs with a view to the purchase of said lands; that thereupon, the said heirs employed an attorney to prepare their petition to the Honorable Secretary of the Interior of the United States, asking him to sell the said lands under and pursuant to the Act of Congress approved March 27, 1902 (32 Stats., 245-275), providing for the sale of inherited Indian Lands.

That thereafter, to-wit: On the 25th day of January, 1908, the said minor heirs, William, Blanche, Anna, and Clyde Bluejacket, having the aforesaid purpose in view, petitioned the County or Probate Court of Ottawa County, Oklahoma, for the appointment of Carrie Bluejacket, their mother, as their guardian; that on February 8th, 1908, the said Probate Court appointed Carrie Bluejacket as said guardian and on said date issued to her letters of said guardianship.

That prior to said time L. A. LaFolier had been duly and lawfully appointed the guardian of the person and the estate of Cora LaFolier and Louis Pascal, by the United States Court in Probate in and for the Northern District of Indian Territory.

That on or about the 1st day of July, 1908, the said Carrie Bluejacket, as Guardian of William, Blanche, Anna, and Clyde Bluejacket, and L. A. LaFolier, as Guardian of Cora LaFolier and Louis Pascal, filed their petition in and with the County or Probate Court of Ottawa County, Oklahoma, for

leave to sell the interests of their said wards in and to certain allotted lands, under and pursuant to the laws of the United States applicable to the sale of the said lands, to-wit: The Act of May 27, 1902 (32 Stats., 245-275) and the rules and regulations promulgated thereunder by the Secretary of the Interior of the United States; and at the same time, and coincident therewith, all of the heirs of the said Charles Bluejacket, deceased, filed with the said court their written consent to waive notice of the hearing of said petition to sell said lands, and consented that an order of sale as prayed for be made forthwith.

That thereafter, to-wit: On the 17th day of July, 1908, the said Probate Court of Ottawa County, Oklahoma, in due form of law, made and entered its order as prayed for by the said petitioners, ordering and directing that the said interests of the said minors and wards be sold as prayed for in said petition, in accordance with the laws of the United States and the rules and regulations promulgated thereunder by the Secretary of the Interior of the United States; which said petitions and orders were in each instance so made and filed as of said dates and are now of record in the office of the County Court of Ottawa County, Oklahoma.

That thereafter, all of the heirs of the said Charles Bluejacket, deceased, including the plaintiffs herein, in due form petitioned the Honorable Secretary of the Interior of the United States and the Superintendent in charge of Quapaw Agency, Wyandotte, Oklahoma, requesting the sale of the lands mentioned in the petition, the subject of this controversy, and other lands, and agreed in said petition to be governed by the rules and regulations of the Secretary of the Interior of the United States and the amendments thereto governing the sale of such lands and the control of the proceeds to be derived from said sale.

That upon the filing of the said petition asking for said sale, Ira C. Deaver, superintendent, and his appraisement official in charge, did visit and view said lands and examine and appraise same at its true value according to their best judgment and in accordance with the rules and regulations promulgated by the Secretary of the Interior of the United States and did make a certificate of appraisement and signed and sealed said appraisement and did not make the same public, and did not open same until the date of the sale, and did not, before or after said sale, make the same public; all of which occurred months before the defendant was ever appointed Special Attorney to prosecute certain land suits and before said defendant had ever heard of the Quapaw Indians, or knew that they had allotted lands.

That thereupon the said lands were duly advertised for sale by the Secretary of the Interior of the United States, as provided by law, and said lands with other lands, were publicly offered for sale by large published advertisements in the newspapers and by large posters such as are commonly used by the Department of the Interior in the advertising of its public lands, and by the mailing of said posters to possible purchasers and interested persons, until the said of the first sale, which said

First Sale was had on August 17, 1908, when the bids were opened, at which time the highest bid on said lands was made by one Adelbert Hughes, in the sum of four thousand dollars (\$4,000) and which said bid was rejected as being less than the appraised value of said land.

That thereafter, upon the further petition of the said heirs, and in the manner provided by law, the said lands were a *Second Time* in like manner offered for sale under date of September 21, 1908, at which time there were no bids received for said land.

In like manner, upon the petition of the heirs of the said Charles Bluejacket, deceased, the said lands were for a *Third Time* offered for sale under date of October 26, 1908, at which time there were no bids received for said land.

That thereafter, the said lands were for a *Fourth Time* offered for sale under date of November 27, 1908, at which time there were no bids received for said land.

That thereafter, in like manner, said lands were for a *Fifth Time* offered for sale under date of December 21, 1908, at which time the defendant, Paul A. Ewert, did offer and bid for said lands mentioned in the complaint, the sum of four thousand dollars (\$4,000), but said bid was rejected because less than the appraised value of said land.

That thereafter, to-wit: On the 25th day of January, 1909, the said lands were for a *Sixth Time* publicly offered for sale to the highest bidder under and pursuant to the laws of the United States, at which time the defendant, Paul A. Ewert, bid the sum of four thousand six hundred and eighty dollars (\$4,680) for said lands, which said bid was rejected because it was less than the appraised value of said land.

That thereafter, to-wit: On the 22nd day of February, 1909, the said lands were for a *Seventh Time* publicly advertised and offered for sale under the said Act of Congress and the rules and regulations of the Secretary of the Interior, at which time said defendant, Paul A. Ewert, bid the sum of four thousand dollars (\$4,000) for one hundred sixty (160) acres of said land, which said bid was rejected because it was less than the appraised value of said land.

That thereafter, to-wit: On the *29th day of March, 1909*, the said lands were for the *Eighth Time* publicly advertised and offered for sale under the said Act of Congress and the rules and regulations promulgated thereunder, at which time this defendant bid on said lands against the public and all of the public, offering for the same the sum of five thousand dollars (\$5,000), which said bid was found to be above the appraised value of said land and was accepted by the Secretary of the Interior of the United States and was accepted by these plaintiffs with full knowledge of all the facts of the defendant's employment.

That thereafter, to-wit: On the *8th day of April, 1909*, and on the *13th day of April, 1909*, all of the said heirs, acting for themselves and for their wards, joined in the execution of a warranty deed to the defendant, wherein and whereby they conveyed to said defendant the lands mentioned in the complaint.

Defendant further shows to the court that *after* he had in said lands and *before* said deed was approved, the Commissioner of Indian Affairs of the United States, the Secretary of the Interior of the United States, and the Attorney General of the United States, were advised of his acts, and the defendant personally conferred with each of them relative to the legality of his acts, and the propriety of his acts and the ethical side of his acts, and the said officials conferred with each other, and advised this defendant that they saw no objection to the act of the defendant in bidding upon the said lands at public sale to the highest bidder as against all other bidders who might possibly have wanted said land and had an opportunity to purchase the same, and it was not in violation of his official duties, and each of the said officials recommended that the sale be approved, thereupon, on the *19th day of July, 1909*, the said deed was recommended for approval by the Commissioner of Indian Affairs of the United States and on the *26th day of July, 1909*, the said deed was in all things approved by the Secretary of the Interior of the United States and by him returned to Ira C. Deaver, Superintendent and Special Disbursing Agent, for delivery to this defendant; and thereafter, the said deed was, by request of the plaintiffs herein made to Ira C. Deaver, Superintendent, delivered to this defendant and the full purchase price thereof paid by this defendant to the Secretary of the Interior of the United States, to be disbursed by him to the heirs of the said Charles Bluejacket, deceased, in accordance with the rules and regulations of the United States theretofore agreed upon between the Honorable Secretary of the Interior of the United States and the heirs of Charles Bluejacket, deceased, including these plaintiffs.

And defendant further shows to the court that in all of his conduct herein in the purchase of said land, he acted in the utmost good faith, believing that he had a lawful right to bid upon the said lands at such public sale as against all other bidders who might desire to purchase same.

Defendant states that he did not enter into possession of the said lands until the crop season of 1910, by reason of the facts that said lands had theretofore been leased by the heirs of Charles Bluejacket, deceased, including these plaintiffs.

That between said time and the filing of the complaint herein, defendant expended more than one thousand dollars (\$1,000) in the form of permanent improvements upon said land by the erection thereon of necessary buildings, to-wit: A house, a granary, a chicken coop, a stable, a hay barn, and an outhouse and other buildings, and by installing pumps to pump the necessary water; that he expended the further sum of one hundred dollars (\$100) in the building of fences, upon the said land; that he further improved the value of said lands and farm to the extent of at least five hundred dollars (\$500) by clearing off the stumps from said land and cutting off the brush and cutting off and destroying the tree sprouts which had overrun the said premises, and by the construction of drainage ditches and the reclaiming of much waste land, and by fertilizing it so as to make it productive, because at the time he obtained possession of it, the land had been cropped without fertilization for a period of thirty years and was poor and in a run down condition and would not produce crops of corn and grain.

This defendant, making further answer to the allegations contained in the complaint herein that he has received large sums of royalty from the said lands, states that while he has received a small sum in the form of royalty, that he and his lessees in prospecting said lands and in attempting to mine the same and make it valuable for mining purposes, expended the sum of fifty thousand dollars (\$50,000) but were unable to find ore in paying quantities, and alleged the fact to be that the land is not mineralized, and that it does not contain ore in paying quantities; and further says that in said operations defendant and his lessee lost at least twenty-five thousand dollars (\$25,000) by virtue of said operations so carried on in good faith.

Defendant further shows to the court that during the time that he has occupied said lands he has paid to the County of Ottawa, State of Oklahoma, taxes in excess of the sum of five hundred dollars (\$500) which taxes were duly and lawfully levied against the said lands and collected of this defendant.

Defendant, further answering, denies that the said lands were, at the time they were purchased by the defendant, of any other or a greater value than five thousand dollars, but shows to the court that the question of the value of the lands at the time they were purchased by him is not within the issues of his case, because the Secretary of the Interior of the United States fixed the value of the same; and defendant asks that no evidence be adduced in support of the contention of the plaintiffs that they were of a greater value, for the reason that such evidence would be incompetent, irrelevant and immaterial.

X.

Defendant admits he purchased the said lands and that they were conveyed to him by the plaintiffs in this suit by an instrument of conveyance of which defendant's Exhibit 'A,' is a true and correct copy, but alleges and shows to the court that the said purchase was made by him in all things under and pursuant to the Act of Congress of May 27, 1902, providing for the sale of inherited Indian lands, and pursuant to and in accordance with the rules and regulations promulgated thereunder by the Secretary of the United States, a true and correct copy of which said rules and regulations is hereunto attached, marked Exhibit 'B' and made a part of this answer, and not otherwise.

XI.

Further answering, the defendant shows to the court that these plaintiffs made, executed and delivered to the defendant their certain warranty deed, Exhibit 'A,' with full knowledge of all of the facts relative to the employment of the defendant and the manner in which the said sale was made through the Department of the Interior; and alleges that the said plaintiffs are therefore estopped at this time, by reason of their said conduct, from denying the validity of the said deed, and are estopped from attacking the same after any manner or fashion whatsoever, by reason of their own conduct in the premises.

XII.

Defendant, further answering, shows to the court that with full knowledge of all the facts and circumstances concerning the sale of said land to said defendant, Paul A. Ewert, as alleged, they yet executed and delivered to the defendant their warranty deed in and to said premises conveying the same to the said defendant, which said deed, to-wit: The deed of which Exhibit 'A' is a copy, was made, executed and delivered on the 8th day of April, 1909, these plaintiffs delivered the said deed to the defendant and permitted him to enter into possession of the same and to occupy and enjoy it, and be in possession thereof unmolested and without protest, up to the

month of June, 1916, or nearly seven and one-half years; and said plaintiff stood by and saw this defendant improve said land and erect thereon costly buildings and build fences and make other costly and permanent improvements upon said land and did not institute any suit or any legal proceedings whatsoever for the purpose of questioning the title of the defendant, or ousting him from possession, or setting aside the said deed of conveyance, until the institution of the suit in this case in the month of June, 1916; and defendant alleges that the plaintiffs are by their said conduct guilty of laches and estopped from at this time asserting or claiming any right, title or interest in and to said premises, or from instituting a suit to set aside the said conveyance or attempting to gain possession of the said lands by any manner whatsoever.

XIII.

As a further and separate defense herein, the defendant pleads and relies upon the statute of limitations of actions of the State of Oklahoma in bar of plaintiffs' right to maintain the suit and recover, under said Section 4657 of the Revised Laws of the State of Oklahoma of 1910 and shows to the court that the plaintiffs herein have had both actual and constructive notice of all the facts relied upon by the plaintiffs in the petition relative to the purchase of the said land by the said defendant, Paul A. Ewert, for more than five years previous to the commencement of this action, and for more than three years previous to the commencement of this action, and for more than two years previous to the commencement of this action, and defendants shows to the court that these plaintiffs, during all of the said five years have had actual knowledge of the fact that the said defendant did purchase the lands mentioned, in his own name, and that none of the said plaintiffs during said period of five years and of three years and of two years previous to the commencement of said action were under any legal disability; and defendant prays that this said suit upon said grounds be dismissed as against this defendant, and that he be allowed to go hence and recover his costs herein.

Wherefore: Defendant demands judgment against the plaintiffs and each of them, that they recover nothing, and that their said suit be dismissed, and that the defendant have his costs and disbursements herein necessarily incurred.

And defendant further prays that in the event that this court shall hold that the purchase of the said lands by said defendant were unlawful by reason of his employment as Special Attorney to prosecute certain land suits in Oklahoma, that it shall also find that in making the said purchase this defendant did so with the knowledge and consent and approval of the Commissioner of Indian Affairs of the United States,

of the Secretary of the Interior of the United States, and of the Attorney General of the United States, and that it was therefore made in absolute good faith upon his part, that for said reason, the said defendant, if he be required to re-deed the said premises and make an accounting of his use of the same, shall have offset against the value of said land and the rental of the same, all sums of money in good faith expended by the defendant in the improvements of the said land as alleged in the answer, to-wit: The sum of one thousand dollars for buildings, etc.; one hundred dollars for fences, etc.; and five hundred dollars for permanent improvements in clearing said lands from trees and stumps and brush and in the construction of drainage ditches, and for fertilizing the same so that said land became productive and defendant further asks that there be offset against the said amount a sum of money as interest at the rate of eight per cent per annum on five thousand dollars, the purchase price of the said land, from the date of said purchase to the final determination of this suit; and defendant further asks for such other and further relief as to this court sitting as a court of equity may deem expedient and just.

PAUL A. EWERT,
Defendant, Acting as his own Attorney,
405-406 Frisco Building,
Joplin, Missouri.

State of Missouri, County of Jasper, ss.

Paul A. Ewert, first being duly sworn, deposes and says that he is the defendant in the above entitled action; that he has read and knows the contents of the above and foregoing answer, and that the statements contained herein are true, except as to those matters that are therein stated upon information and belief, and as to those matters, he believes them to be true.

Paul A. Ewert.

Subscribed and sworn to before me this 29th day of September, A. D. 1916.

(Seal)

W. D. Lyerle, Notary Public,
Jasper County, State of Missouri.

EXHIBIT "A."

INDIAN DEED INHERITED LANDS

This indenture, made and entered into this eighth day of April, one thousand nine hundred and nine, by and between Carrie Bluejacket, as widow, Rose B. Daugherty and her husband, Edward Daugherty, Ida B. Holden and her husband, E. L. Holden, Walter Bluejacket, Edward Bluejacket and his

wife, Delpha Bluejacket, Carrie Bluejacket as guardian of William Bluejacket, Blanche Bluejacket, Amy Bluejacket, and Clyde Bluejacket, minors, and L. A. LaFalie as guardians of Cora LaFalie and Louis Pascal, minors, and L. A. LaFalie, as husband of Flora LaFalie, deceased, of Quapaw Agency, Ottawa County, Oklahoma, heirs of Charles Bluejacket, Quapaw allottee No. 16 of Quapaw Agency, Okla., deceased, a Quapaw Indian, parties of the first part, and Paul A. Ewert of Miami, Oklahoma, part of the second part:

Witnesseth: That said parties of the first part, for and in consideration of the sum of five thousand dollars, in hand paid, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey unto said party of the second part the following described real estate and premises situated in Ottawa County, State of Oklahoma, to-wit:

The East One Half of the South West Quarter of Section Thirty two (32); The South West of the South West Quarter of Section Thirty two (32), in Township Twenty Nine (29), North of Range Twenty four, East of the Indian Meridian, Oklahoma, and Lots Number One (1) and Two (2) of the North East Quarter of Section Five (5), in Township Twenty eight (28), North of Range Twenty four (24) East of the Indian Meridian, Oklahoma, in all containing Two Hundred acres, more or less, together with all the improvements thereon and the appurtenances thereunto belonging, and warrant the title to the same.

To have and to hold said described premises unto the said party of the second part, his heirs, executors, administrators and assigns, forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year above written.

Witnesses:

Wm. D. Hodgkiss,

B. N. O. Walker.

her mark.

Carrie X Bluejacket (Seal)

Rosa B. Daugherty (Seal)

Edward Daugherty (Seal)

Ida B. Holden (Seal)

E. L. Holden (Seal)

Walter Bluejacket (Seal)

Edward Bluejacket (Seal)

Delpha Bluejacket (Seal)

her mark as guardian

Carrie X Bluejacket (Seal)

(William Bluejacket (Seal)

(Blanche Bluejacket (Seal)

(Amy Bluejacket and (Seal)

(Clyde Bluejacket (Seal)

L. A. La Falier (Seal)

as guardian of Cora La Falier
and Louis Pascal, minors

L. A. La Falier (Seal)

as husband of Flora La Falier,
deceased.

R. M. Shriver

F. J. LaFalier

The above sign as witnesses to signature

L. A. LaFalier as guardian and as
husband of Flora LaFalier, deceased.

SUPERINTENDENT'S ACKNOWLEDGMENT.

Be it remembered, that on this eighth day of April, 1909, before me the undersigned, superintendent for the Quapaw Agency, Oklahoma, personally appeared Carrie Bluejacket, as widow and heir, Rose B. Daugherty and her husband, Edward Daugherty, Ida B. Holden and her husband, E. L. Holden, Walter Bluejacket, Edward Bluejacket and his wife, Delpha Bluejacket, and Carrie Bluejacket as guardian for William, Blanche, Amy and Clyde Bluejacket, minors; heirs of Charles Bluejacket, to me personally known to be the identical persons who executed the within instrument of writing and such persons duly acknowledged the execution of the same as their free and voluntary act and deed for the uses and purposes therein set forth. I further certify that the contents, purpose and effect of the deed of conveyance were explained to and understood by the grantors.

In testimony whereof, I have hereunto subscribed my name, officially, on the date last above written.

Ira C. Deaver, Superintendent.

State of Oklahoma, County of Ottawa, ss.

Be it remembered, that on this 13th day of April, A. D. 1909, before the undersigned, a notary public, in and for the county and state aforesaid, personally appeared L. A. LaFalier as guardian for Cora LaFalier and Louis Pascal, minors and as husband of Flora LaFalier, deceased, to me personally known to be the identical person who executed the within instrument of writing, and such person duly acknowledged the

execution of the same as his free and voluntary act and deed for the uses and purposes therein set forth.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day and year last above written.

(Notarial Seal) R. M. J. Shriver, Notary Public.
My com. exp. Mch 26-1910.

State of Oklahoma, County of Ottawa, ss.

Be it remembered, that on this eighth day of April, A. D. 1909, before the undersigned, a notary public in and for the county and state aforesaid, personally appeared Carrie Bluejacket, widow, Rose B. Daugherty and her husband, Edward Daugherty, Ida B. Holden and her husband, E. L. Holden, Walter Bluejacket, Edward Bluejacket and his wife, Delpha Bluejacket, and Carrie Bluejacket, as guardian for William Bluejacket, Blanche Bluejacket, Amy Bluejacket, and Clyde Bluejacket, minors, to me personally known to be the identical persons who executed the within instrument of writing, and such persons duly acknowledged the execution of the same as their free and voluntary act and deed for the uses and purposes therein set forth.

In testimony, whereof, I have hereunto subscribed my name and affixed my official seal on the day and year last above written.

(Notarial Seal) C. B. Coe, Notary Public.
My commission expires Feb. 28th, 1919.

(Endorsed on back):

Department of the Interior,
Office of Indian Affairs,

Jul 19 1909, 190

The within deed is respectfully submitted to the Secretary of the Interior, with the recommendation that it be approved.

R. W. Valentine, Commissioner.

Department of the Interior,

July 26-1909.

The within deed is hereby approved.

Frank Pierce,
First Assistant Secretary.

Office of Indian Affairs,

Land Division.

Aug. 7-1909.

Recorded in Deed Book, Inherited Indian Lands, Vol. 22,
page 127.

Approved—July 26-09.

Frank Pierce.

(Endorsed on back):

Office of Indian Affairs

Received May 25 1909 File 40233

Warranty Deed from Carrie Bluejacket, Rose B. Daugherty & husband, Edward Daugherty, Ida B. Holden & husband, E. L. Holden, Edward Bluejacket, guardian, L. A. LaFallier, guardian, to Paul A. Ewert."

Here follow the amended rules of the Department of the Interior for conveyance of inherited Indian lands. These rules are set forth in full in the Record, pages 39 to 45, inclusive.

**SPECIFICATIONS OF ERROR BY APPELLANT,
PAUL A. EWERT.**

The appellant, Paul A. Ewert, with his petition for appeal to this court made and filed the following specifications of error, to-wit (Rec. 254-258):

"1. Because the court erred in denying the motion of the said Paul A. Ewert to dismiss the appeal filed in said case in said Circuit Court of Appeals of the United States for the Eighth Circuit.

2. Because the court erred in holding that the said Paul A. Ewert by his appointment as Special Assistant to the Attorney General of the United States "to assist in the institution and prosecution of suits to set aside deeds made to certain allotments in Quapaw Indian Agency," was employed in Indian affairs within the meaning of Rev. St. 2078 (Compiled Statutes, Paragraph 4026), providing that no person so employed shall have any interest or concern in trade with Indians.

3. Because the court erred in holding that the purchase of the land in question by the said Paul A. Ewert while so employed constituted "trade with Indians" within the prohibition of the Revised Statute No. 2078 (Compiled Statute No: 4026), though the sale was made under and pursuant to the Act of May 27, 1902, Paragraph 7 (Compiled Statute No. 4023), and the rules and regulations promulgated thereunder by the Secretary of the Interior of the United States, although the said purchaser never say or communicated with any of the Indians and they themselves were not conscious that he was so employed as Special Assistant to the Attorney General of the United States under the terms of his employment.

4. Because the court erred in holding that

"Under Rev. Laws Okl. 1910, No. 885, authorizing minors to disaffirm contracts before majority or within one year thereafter, a suit by an Indian's minor heirs to set aside their guardian's conveyance of land was not barred by laches when brought before their majority." applied to the purchase of said lands by Paul A. Ewert.

5. Because the court erred in holding that where in a suit to set aside a guardian's conveyance of the interest of minor heirs of deceased Indians, laches did not appear on the

face of the bill or in plaintiff's proof, it is incumbent upon defendant to show the existence of laches, as applied to this suit.

6. Because the court erred in holding that the rule that ordinarily it is necessary for one seeking the cancellation of a deed to do equity by restoring the consideration received does not apply to the disaffirmance of a deed by the infants suing, if prior to the disaffirmance and during infancy the consideration received has been disposed of, wasted or consumed and cannot be returned, as applied to the conduct of the minor heirs in this suit.

7. Because the court erred in holding that in this suit it was not obligatory upon the minor heirs suing to restore the consideration paid by the purchaser to them and their guardian, the United States of America and its duly qualified and acting officer, to-wit: The Secretary of the Interior of the United States.

8. Because the court erred in rendering judgment in favor of Amy Bluejacket.

9. Because the court erred in rendering judgment in favor of Clyde Bluejacket.

10. Because the court erred in rendering judgment in favor of Blanche Bear, formerly Bluejacket.

11. Because the court erred in rendering judgment in favor of Carrie Bluejacket as the heir of William Bluejacket, deceased, for a cancellation of the deed from these four minor heirs to the said defendant.

12. Because the court erred in reversing the decree of the lower court and remanding the same with directions to grant the prayers of Amy and Clyde Bluejacket, of Blanche Bear, formerly Bluejacket, and of Carrie Bluejacket, as the heir of William Bluejacket, deceased, for a cancellation of the deed from these four minor heirs to the defendant and for an accounting and an indemnification against the apparent lien of the mortgage on their shares of the land.

13. Because the court erred in not affirming the judgment and decree of the trial court.

14. Because the court erred in not holding that the selling of the land in question under and pursuant to the Act of May 27, 1902, Paragraph 7, and the rules and regulations promulgated thereunder by the Secretary of the Interior, had the effect of removing the restrictions prior to the delivery of the deed, and so had the effect of taking the transaction out of the law prohibiting trade with "Indians."

15. Because the court erred in holding that the deed to Ewert at the time of its execution and delivery was void, in this, that in so holding, the court fixes an additional penalty not provided for in the statute and not intended to be placed therein by the Congress of the United States.

16. Because the court erred in refusing to hold that the legality of the conveyance to Ewert can be questioned or impugned by the grantors and their heirs and that the sovereign alone can object.

17. Because the court erred in holding that the purchase of the land by Ewert was "trade" with Indians within the meaning of the statute.

18. Because the court erred in holding that the sale of the land under the Act of May 27, 1902, by the Secretary of the Interior of the United States to the said Ewert was trade with "Indians."

19. Because the court erred in failing to hold that as the Secretary of the Interior of the United States was called upon to decide before the delivery of the deed to Ewert, whether the grantee, Ewert, was employed in Indian Affairs, that his decision that Ewert was not so employed was final.

20. The court erred in failing to hold that as the question of the incapacity of the grantee, Ewert, to take the said land under said sale by the Secretary of the Interior was submitted to the Department of Justice and decided in his favor, that said decision was final and binding upon the courts in this case.

21. That the court erred in not holding that both the adult heirs and the minor heirs were estopped from denying the validity of the deed in question under and pursuant to the laws of the State of Oklahoma, to-wit: Section 1150, Revised Laws, 1910, which reads as follows:

'Estoppel by receiving benefits—Any person or corporation having knowingly received and accepted the benefits or any part thereof of any conveyance, mortgage or contract relating to real estate shall be concluded thereby and estopped to deny the validity of such conveyance, mortgage or contract, or the power or authority to make and execute the same, except on the ground of fraud; but this section shall not apply to minors or persons of unsound mind who pay or tender back the amount of such benefit received by themselves.'

Said minors not having tendered back the amount of benefit received.

22. The court erred in not holding with the learned Judge Carland, then United States District Judge for the District of South Dakota, on the trial of the case of *United States v. Jennie L. Douglas*, that Section 2078 applied only to sales of merchandise to Indians, not to purchases.

23. The court erred in not holding that said Section 2078, R. S. does not apply to real estate transactions, and in any event, that it does not now so apply.

24. The court erred in holding that the defendant, Ewert, under his employment was "an officer of the Indian Department."

25. The court erred in not holding that the term "employed in Indian Affairs" found in Section 2078, means "employed in the office of Indian Affairs."

26. The court erred in not holding that the decision of the Secretary of the Interior of the United States, and of the Attorney General of the United States, and of the Commissioner of Indian Affairs that Ewert was within his lawful rights in purchasing said land, was such a Departmental construction in Ewert's favor as to make it controlling and the construction of the statute to such an extent that the court was bound to accept it.

27. The court erred in not holding that under the terms of Ewert's employment as Special Assistant to the Attorney General of the United States, he was not restricted in purchases or commercial matters such as the purchase of the land in question, and in not giving due weight and consideration to the many opinions of the office of the Attorney General of the United States to that effect in similar matters.

28. The court erred because its decision is inconsistent with its own findings of fact, in this, that the court, in Paragraphs 3 and 4 of its opinion, found as follows, to-wit:

'It is not shown that the defendant ever saw or communicated with any of the plaintiffs, or that the Indians were conscious that defendant was employed in Indian Affairs.'

* * * * *

'That the defendant therefore claims that he was not engaged in any trade with the Indians, but that his dealing was with the United States. This view ignores the fact that the plaintiffs in deciding whether to refuse or accept defendant's bid, and in executing the deed to defendant as grantee may have signed it because of confidence in his official position and his relation to the Indians.'

29. The court erred in not holding that the defendant, Ewert, was acting in such good faith in the purchase of said

land that he is entitled to a restoration of the purchase price paid to the said Amy and Clyde Bluejacket and Blanche Bear and Carrie Bluejacket as the heir of William Bluejacket, deceased, and that he is further entitled in the accounting between said parties, to offset the value of the improvements placed by him on said land, the taxes paid, etc., as shown by the testimony.' "

Specifications of Error All Directed to Two Points.

It will be seen from the several specifications of error above mentioned, that they are directed to and challenge the rulings of the court on two points, to-wit:

First. That the defendant, Ewert, was disqualified from purchasing the land under the provisions of Section 2078; that the statute applied to the taking of the deed by Ewert.

Second. That the court erred in finding that the suit of Amy and Clyde Bluejacket, and of Blanche Bear and Carrie Bluejacket, as heirs of William Bluejacket, deceased, was not barred by laches.

A history of the origin and purpose of Section 2078, under which the Circuit Court of Appeals held that the defendant Ewert could not receive the conveyance here sought to be set aside.

By the fortunes of war, or perhaps speaking more correctly, the fortunes and misfortunes of legal proceedings that frequently occur in litigation, the Honorable John E. Carland, at the time this case was heard then sitting as a Circuit Judge in the United States Court of Appeals for the Eighth Circuit, did not sit in this case. Had he been a sitting judge, the outcome might have been different. This statement is made for the reason that Judge Carland sat as the trial court in the case of *United States v. Jennie L. Douglas*, 190 Fed. 482, when that case was tried in the United States District Court for the State of South Dakota.

In the presentation of the case at bar in the Circuit Court of Appeals that court did not have the benefit, in counsel's brief at least, of the history, purpose and analysis of what is now Section 2078 as set forth in the opinion of Judge Carland in passing in his court upon that statute in the case of *United States v. Douglas*, *supra*. Judge Carland there made a full and careful review of the statutes in *pari materia* with Section 14 of the Act of 1834, which was codified as Section 2078, R. S. It is hoped that a careful study of this analysis of the statute by Judge Carland herewith presented may prove of value to this court. Judge Carland in reviewing this section of the statute, there said:

"This action was brought by the United States to recover from the defendant Jenny L. Douglas the penalty of \$5,000 prescribed by Section 2078, R. S. U. S., which reads as follows:

'No person employed in Indian affairs shall have any interest or concern in any trade with the Indians, except for, and on account of, the United States; and any person offending herein shall be liable to a penalty of five thousand dollars, and shall be removed from office.'

After issue joined, the cause was tried to the court, a jury having been waived as provided by law. The material facts upon which a recovery is sought are not in dispute. They are as follows: The defendant from January 1, 1907, to October 1 of the same year was employed by the United States as industrial teacher at the Crow Creek Indian Agency, South Dakota. She is a member of the Crow Creek Tribe

of Sioux Indians and during the time aforesaid purchased from other members of said Crow Creek Tribe about 250 head of cattle branded I. D. Such brand in connection with the number of the Indian to whom an animal is issued is placed upon cattle issued by the United States to Indians. The cattle were purchased with a view of making a profit thereby. Defendant had purchased such cattle from other members of the Crow Creek Tribe for many years prior to the time mentioned herein on the understanding that the Act of July 4, 1884, 23 Stat. 94, permitted her so to do. The Act referred to is as follows:

'That where Indians are in possession or control of cattle or their increase which have been purchased by the Government, such cattle shall not be sold to any person not a member of the tribe to which the owners of the cattle belong or to any citizen of the United States whether intermarried with the Indians or not, except with the consent in writing of the agent of the tribe to which the owner or possessor of the cattle belongs. And all sales made in violation of this provision shall be void, and the offending purchaser on conviction thereof shall be fined not less than five hundred dollars and imprisoned not less than six months.'

Counsel for the United States contends that the law last above quoted did not extend the right to purchase the cattle mentioned in said law to a person employed in Indian affairs, although the person employed might at the same time be a member of the tribe within the meaning of the law. If the purchase of cattle by the defendant was trading with the Indians within the meaning of Section 2078, it would undoubtedly be the duty of the court to so construe said section, and the Act of July 4, 1884, so as to give effect to both and to hold that the latter act did not give to employes in Indian affairs the right to purchase cattle, although they were members of the same tribe as those Indians from whom cattle were purchased. The vital question in this case is, was the purchase of cattle by the defendant under the circumstances detailed in the evidence trading with the Indians within the prohibition contained in Section 2078. A penal statute, if ambiguous, will be construed more strongly in favor of the defendant than it would if the statute were remedial, but in such a way as to effect substantial justice and preserve the obvious intention of the Legislature. *Bolles v. Outing Company*, 175 U. S. 262. Any doubt as to the application of a penal statute will be resolved in favor of the accused. *United States v. Sheldon*, 2 Wheaton, 119. No one can be punished for a violation of a statute unless his case is plainly and unmistakably within its terms. *United States v. Lacher*, 134 U. S. 624.

The intention of the Legislature must govern in the construction of penal as well as other statutes; and they are not to be construed so strictly as to defeat the obvious intention of the Legislature. *United States v. Morris*, 14 Peters, 464; *United States v. Reese*, 92 U. S. 214; *Johnston v. Southern Pacific Co.*, 196 U. S. 1.

In construing any part of the United States Revised Statutes it is admissible and often necessary to recur to its connection in the act of which it was originally a part. *United States v. Hirsch*, 100 U. S. 33.

It will not be inferred that the Legislature in revising and consolidating the laws intended to change their policy unless such intention be clearly expressed. *United States v. Ryder*, 110 U. S. 729; *Logan v. United States*, 144 U. S. 263. When it becomes necessary to construe language used in the revision which leaves a substantial doubt of its meaning the original statute may be resorted to for ascertaining that meaning. *United States v. Bowen*, 100 U. S. 508; *Victor v. Arthur*, 104 U. S. 498.

If there be any ambiguity in a section of the United States Revised Statutes, resort may be had to the original statute from which the section was taken to ascertain from the language and context to what class of cases the language was intended to apply. *The Conqueror*, 166 U. S. 110.

The history of prior legislation upon the same subject may be considered in determining the intention of Congress in passing a law. *United States v. Stevenson*, 215 U. S. 190.

The commissioners appointed to revise, simplify, arrange and consolidate all statutes of the United States, general and permanent in their nature, in placing Section 2078 in the Revised Statutes of the United States, declared that they took the same from the Act of June 30, 1834, 4 Stat. 738. Section 14 of the Act of June 30, 1834, reads as follows:

'That no person employed in the Indian Department shall have any interest or concern in any trade with the Indians except for and on account of the United States; and any person offending herein shall forfeit the sum of five thousand dollars, and upon satisfactory information of such offense being laid before the President of the United States, it shall become his duty to remove such person from the office or situation he may hold.'

We will now examine the legislation of Congress with reference to the same subject prior to 1834:

The Act of July 22, 1790, 1 Stat. 137, entitled 'An Act to regulate trade and intercourse with the Indian tribes,' provided that no person should be permitted to carry on any trade or intercourse with the Indian tribes without a license

for that purpose from the proper authority and also provided a punishment for every person who should attempt to trade with the Indian tribes without such license.

The Act of April 18, 1796, entitled 'An Act for establishing trading houses with the Indian tribes,' 1 Stat. 452, provided for the establishment of trading houses at such posts and places on the Western and Southern frontiers or in the Indian country as the President should judge most convenient for the purpose of carrying on a liberal trade with the several Indian nations.

Section 2 of said act authorized the President to appoint an agent for each trading house established by him, whose duty it should be to receive and dispose of, in trade with the Indian nations, such goods as such agent should be directed by the President to receive and dispose of. Said section also provided that such agent should take oath or affirmation that he would not 'directly or indirectly be concerned or interested in any trade, commerce or barter with any Indian or Indians whatever, but on the public account.'

This is the first time that language of this character appears in the legislation of Congress. Section 3 also provided that the agent, their clerks or other persons employed by them, should not be directly or indirectly concerned or interested in the carrying on the business of trade or commerce on their own, or any other than the public account, and also provided, if any such agent, clerk or other person employed by them should offend against said prohibition, they should be deemed guilty of a misdemeanor and upon conviction thereof should forfeit to the United States a sum not exceeding one thousand dollars and should be removed from such agency or employment and forever thereafter be incapable of holding any office under the United States.

Section 7 of the same act provided as follows:

'That if any agent or agents, their clerks or other persons employed by them, shall purchase or receive of any Indian in the way of trade or barter a gun or other article commonly used in hunting; any instrument of husbandry or cooking utensil of the kind usually obtained by Indians in their intercourse with white people; any article of clothing (except skins or furs), he or they shall respectively forfeit the sum of one hundred dollars for each offense.'

It clearly appears from this Act of April 18, 1796, that Congress was not of the opinion nor did it intend that the punishment therein provided for agents, their clerks or other persons employed by them for being directly or indirectly concerned or interested in the business of trade or commerce on their own or any other than the public account applied to

or prohibited such agent, clerk or employe from purchasing or receiving from any Indian the property described in Section 7, above quoted, otherwise why should Section 7 have been enacted at all. The Act of May 19, 1796, entitled 'An Act to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontiers,' provided for the issuing of licenses to a trade with the Indians and for a penalty for trading without a license, and in Section 9 made the same provision practically as was contained in Section 7 of the Act of April 18, 1796.

Section 10 of the same act provided that no person should be permitted to purchase any horse of an Indian or of any white man in the Indian Territory without special license for that purpose, and also provided if any person should purchase a horse in violation of said section he should be punished by forfeiting a sum not exceeding one hundred dollars and be imprisoned not exceeding thirty days.

Section 11 of the same act provided, 'That no agent, superintendent or other person authorized to grant a license to trade or purchase horses shall have any interest or concern in any trade with the Indians or in the purchase or sale of any horse to or from any Indian, excepting for and on account of the United States. And any person offending herein shall forfeit a sum not exceeding one thousand dollars and be imprisoned not exceeding twelve months.'

It clearly appears from this legislation that a license to trade with the Indians did not authorize the person so licensed to purchase a horse from them nor did the punishment for trading with the Indians without a license have anything to do with the punishment provided for a person who should purchase a horse without a license therefor. It also appears that Congress thought it necessary in prohibiting clerks and other employes from being interested in any trade with the Indians to also specifically to prohibit them from having any interest or concern in the purchase of horses from any Indian, thus clearly carrying out the idea and intention of Congress that trade with the Indians was a separate and distinct matter from that of purchasing from the Indians horses or the other articles mentioned in Section 9.

The Act of March 30, 1902, 2 Stat. 139, entitled 'An Act to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontiers,' by Sections 9 and 10 thereof prohibited the purchase or receipt by any person from an Indian, in the way of trade or barter, a gun and other articles, under a penalty of fifty dollars and imprisonment not exceeding thirty days, and also the purchase of any horse of an Indian without a license therefor under a

penalty of one hundred dollars and imprisonment not exceeding thirty days.

Section 11 of the same act provided as follows:

'That no agent, superintendent or other person authorized to grant a license to trade or purchase horses shall have any interest or concern in any trade with an Indian or in the purchase or sale of any horse to or from any Indian excepting for and on account of the United States, and any person offending herein shall forfeit a sum not exceeding one thousand dollars and be imprisoned not exceeding twelve months.'

It will thus be seen that the idea of trade with the Indians and purchasing horses and guns and other articles are treated separately and punished differently, and, so far as the intention of the Legislature can be gathered from the language used, it must be held that trade with the Indians within the meaning of the legislation of Congress never was intended to cover purchases of property from them standing alone.

The Act of April 21, 1806, entitled an 'Act for establishing trading houses with the Indian tribes,' 2 Stat. 402, provided for the establishing of trading houses by the President and also the appointment by him of a superintendent of Indian trade, whose duty it should be to purchase and take charge of all goods intended for trade with the Indian nations and transmit the same to such places as should be directed by the President. By Section 2 of said act said superintendent of Indian trade was required to take an oath that he would not directly or indirectly be concerned or interested in any trade, commerce or barter, but on the public account. By Section 6 of the same act it was provided that the superintendent of Indian trade, the Indian agents, their clerks or other persons employed by them, should not be directly or indirectly interested in carrying on the business of trade or commerce with the Indians on their own or any other than the public account. It was also provided that if any such person should offend against said prohibition he should be deemed guilty of a misdemeanor and should upon conviction thereof forfeit to the United States a sum not exceeding one thousand dollars and should be removed from office. By Section 11 of the same act it was provided that if any agent or agents, their clerks or other persons employed by them, should purchase or receive from any Indian, in the way of trade or barter, any gun or other article commonly used in hunting, any instrument of husbandry or cooking utensil of the kind usually obtained by Indians in their intercourse with white people, or any article of clothing excepting skins or furs, he or they should respectively forfeit the sum of one hundred dollars.

The Act of March 2, 1811, 2 Stat. 652, entitled 'An Act for establishing trading houses with the Indian tribes,' provided that the superintendent of Indian trade, the agents or their clerks or other persons employed by them should not be directly or indirectly concerned or interested in carrying on trade or commerce in any of the goods or articles bought for or supplied to or received from the Indians, and that if any such person should offend against any of said prohibitions, he should be deemed guilty of a misdemeanor, and upon conviction thereof should forfeit to the United States a sum not exceeding one thousand dollars, and should be removed from office. Section 8 of the same act re-enacted Section 11 of the Act of April 21, 1806.

We now come to the Act of June 30, 1834, entitled 'An Act to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontiers.' Section 7 of this act is the same as Section 2135 of the Revised Statutes of the United States. There were two Acts of Congress passed on June 30, 1834. The other act was entitled 'An Act to provide for the organization of the Department of Indian Affairs,' and it is Section 14 of the last named act which was substantially carried into the Revised Statutes of the United States as Section 2078 thereof. Nothing appears in the Revised Statutes of the United States to show that trade with the Indians should mean anything different from what those words had always meant in the legislation of Congress, and it appears conclusively to the court that those words always (referred) to the trade or business which the United States authorized by issuing a license to certain persons for exercising that trade or business and that said words never did refer to the purchase of cattle or horses from the Indians.

So far as the investigation made by the court has gone, Congress never did prohibit the purchase of cattle from the Indians until the Act of July 4, 1884, 23 Stat. 94, and that law is confined to so-called issue cattle. It may be that it would be wise to prohibit the purchase of cattle from Indians by persons employed in Indian affairs, but the court cannot supply needed legislation by construction of present laws. There is no doubt in the mind of the court but that the defendant upon the facts proven did not have any interest or concern in any trade with the Indians within the meaning of Section 2078, R. S. U. S., but if the court had a doubt about the true construction of said section under well recognized rules it is bound to resolve that doubt in favor of the defendant. Judgment will therefore be entered in her favor."

The rules and regulations promulgated by the Secretary of the Interior under the Act of Congress of which Section 2078 R. S. is a part, clearly indicate that Congress did not have in mind, and could not have had in mind transactions of the kind involved in this suit.

It is always proper, in construing a statute, to get a view thereof in the light of the times when the statute was enacted. No better idea of the intent of Congress and the purport of the statute can be obtained than from an examination of the rules and regulations promulgated under that statute by the Secretary of the Interior of the United States, whose duty it was at that time and has been ever since, to provide rules and regulations under the provisions of the so-called "Indian Act."

An examination of those rules and regulations which are immediately hereinafter set forth, must convince the court that the legislative intent of the statute as enacted, and subsequently modified, was of an entirely different character than that assigned to it by the Honorable Circuit Court of Appeals. The amended rules and regulations as promulgated by the Secretary of the Interior and Commissioner of Indian Affairs under said Section 2078 are as follows, to-wit:

(AMENDED RULES AND REGULATIONS AS
PROMULGATED BY COMMISSIONER OF INDIAN
AFFAIRS, 1904).

"TRADE WITH INDIAN TRIBES.

Licensed Traders.

517. The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper, specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians (Act of Aug. 15, 1876, Sec. 5, 19 Stats., 200).

518. No person employed in Indian affairs shall have any interest or concern in any trade with Indians except for and on account of the United States; and any person offending herein shall be liable to a penalty of \$5,000, and shall be removed from his office (Sec. 2078, R. S.).

519. Any person other than an Indian of the full blood who shall attempt to reside in the Indian Country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and

shall moreover be liable to a penalty of five hundred dollars: Provided, that this section shall not apply to any person residing among or trading with the Choctaws, Cherokees, Chickasaws, Creeks or Seminoles, commonly called The Five Civilized Tribes, residing in the Indian Territory, and belonging to the Union Agency therein: And provided further, that no white person shall be employed as a clerk by any Indian trader, except such as trade with said Five Civilized Tribes, unless first licensed so to do by the Commissioner of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior (22 Stats. 179).

520. Every person, other than an Indian, who, within the Indian Country, purchases or receives of any Indian, in the way of barter, trade, or pledge, a gun, trap, or other article commonly used in hunting, any instrument of husbandry, or cooking utensil of the kind commonly obtained by the Indians in their intercourse with the white people or any article of clothing, except skins or furs, shall be liable to a penalty of \$50 (Sec. 2135; R. S.).

521. By the act of July 23, 1892, it is enacted that Section 2139 of the Revised Statutes be amended so as to read as follows:

No ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind shall be introduced, under any pretense, into the Indian country. Every person who sells, exchanges, gives, barter, or disposes of any ardent spirits, ale, beer, wine, or intoxicating liquors of any kind to any Indian under charge of any Indian superintendent or agent, or introduces or attempts to introduce any ardent spirits, ale, wine, beer, or intoxicating liquors of any kind into the Indian country shall be punished by imprisonment for not more than two years and by fine of not more than \$300 for each offense. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine or intoxicating liquors into the Indian country that the acts charged were done under authority in writing from the war department, or any officer duly authorized thereunto by the war department. All complaints for the arrest of any person or persons made for violation of any of the provisions of this act shall be made in the county where the offense shall have been committed, or if committed upon or within any reservation not included in any county, then in any county adjoining such reservation, and, if in the Indian Territory, before the United States Court Commissioner, or Commissioner of the Circuit Court of the United States residing nearest the place where the offense was committed, who is not for any reason disqualified; but in all cases such arrest shall be made

before any United States Court Commissioner residing in such adjoining county, or before any magistrate or judicial officer authorized by the laws of the state in which such reservation is located to issue warrants for the arrest and examination of offenders by Section 1014 of the Revised Statutes of the United States. And all persons so arrested shall, unless discharged upon examination, be held to answer and stand trial before the court of the United States having jurisdiction of the offense (27 Stats., 260).

522. If any superintendent of Indian affairs, Indian agent, or sub-agent, or commanding officer of a military post has reason to suspect or is informed that any white person or Indian is about to introduce or has introduced any spirituous liquor or wine into the Indian country in violation of law, such superintendent, agent, sub-agent, or commanding officer may cause the boats, stores, packages, wagons, sleds and places of deposit of such person to be searched; and if any such liquor is found therein, the same, together with the boats, teams, wagons, and sheds used in conveying the same, also the goods, packages, and peltries of such person shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court, and forfeited, one-half to the informer and the other half to the use of the United States; and if such person be a trader, his license shall be revoked and his bond put in suit. It shall, moreover, be the duty of any person in the service of the United States, or of any Indian, to take and destroy any ardent spirits or wine found in the Indian Country, except such as may be introduced therein by the War Department. In all cases arising under this and the preceding section, Indians shall be competent witnesses (Sec. 2140 R. S.).

523. No part of Section 2139 or of Section 2140 of the revised statutes shall be a bar to the prosecution of any officer, soldier, sutler, or storekeeper, attache, or employee of the army of the United States who shall barter, donate, or furnish in any manner whatsoever liquors, wines, beer, or any intoxicating beverage whatsoever to any Indian (Act July 4, 1884, 23 Stats., 94).

524. Any loyal person, a citizen of the United States, of good moral character, shall be permitted to trade with any Indian tribe upon giving bond to the United States in the penal sum of not less than \$5,000 nor more than \$10,000 with at least two good sureties, to be approved by the superintendent of the district within which such person proposes to trade, or by the United States District Judge or district attorney for the district in which the obligor resides, renewable each year, conditioned that such person will faithfully observe all laws

and regulations made for the governor of trade and intercourse with the Indian tribes, and in no respect violate the same (Sec. 2128, R. S.).

525. The act of March 3, 1901, provides as to the Osage Reservation as follows: "On and after July first, nineteen hundred and one, any person desiring to trade with the Indians on said reservation shall, upon establishing the fact to the satisfaction of the Commissioner of Indian affairs that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian affairs may prescribe for the protection of said Indians. The act of March 3, 1903, extends the above provision "to apply to all Indian reservations" (31 Stats. 1065 and 32 Stats. 1009).

526. A "proper person" is one whose personal character and influence among the Indians is conducive to their welfare and whose dealings with them are both honest and just. Bad morals, dishonest methods, or extortionate prices are among the disqualifications of a "proper person" to trade among Indians.

527. Application for license must be made in writing, setting forth the full name and residence of applicant; if a firm, the full firm name and name of each member; the place it is proposed to carry on the trade; the capital to be employed; the names of the clerks or other persons to be employed; the record of applicant for five years previous, etc. This application must be forwarded to the Commissioner of Indian Affairs.

528. Satisfactory testimonials as to the character of the applicant and his employees and their fitness to be in the Indian country must accompany this application.

529. Applications for license forwarded by the agent must be accompanied by the affidavit of the agent that neither he nor any person for him has any interest, directly or indirectly, present or prospective, in the proposed business or the profits arising therefrom and that no arrangement for any benefit to himself or to other person or persons on his behalf is in contemplation in case the license shall be granted.

530. No license will be granted for a longer period than one year; but at the end of that time, if the Commissioner of Indian affairs be satisfied that the trade has been conducted properly, and that the laws, the regulations and the terms of the license have been duly observed, a new license may be granted.

531. Application for renewal of license must be made to the Commissioner of Indian Affairs through the agent of

the Indians with whom the trade has been carried on, and the agent must testify as to the record which applicant has made as trader and his fitness to continue as such under a new license.

532. The application for the renewal of a license must be made at least thirty days prior to the expiration of the existing license.

533. A new bond must be given with each renewal of license, as required in Section 534.

534. A bond in the penal sum of \$10,000 must be furnished by the person or persons licensed that they will faithfully observe all the laws and regulations made for the government of trade and intercourse with the Indian tribes, and will in no respect violate the same (Sec. 2128, R. S.).

535. The bond must be made out in accordance with the following instructions:

1. If a bond with individuals as sureties is given, there must be not less than two such sureties, but a guaranty company duly qualified under the act of August 13, 1894, may be accepted as sole security.

2. The full name of the principal and each of his sureties should be written in the body of and so signed to the bond. If any woman signs as surety it must satisfactorily appear that she is unmarried, married women not being accepted as sureties except where, under the laws applicable, she is competent to make such a contract, and her separate property can be taken in the enforcement thereof, and except also where, under the laws applicable, she may sign with her husband, and thereby charge their community property with liability upon execution.

3. There must be a seal of wax, wafer, or other adhesive substance attached to each signature. The printed word "seal" or a scroll is not sufficient.

4. The residence of each principal and surety must be distinctly stated, and the signature of each of them must be made in the presence of two witnesses, and it must appear for whom each witness signs.

5. The bond, if with individual sureties, must be approved by a United State district judge or attorney, and the approval must be of even or subsequent date to that of the bond.

6. Bonds must not be executed on Sundays or legal holidays.

7. Sureties (individual) must not be bonded officers of the United States, or attorneys having business before the Indian office or employees of the principal.

8. Special pains must be taken to prevent erasures or mutilations of any kind in the bond, but if they do occur it must be explained by a certificate of the officer by whom the bond is approved that they were made before the bond was signed by the principal and his sureties.

536. If, after the license shall have been granted, a trader desires to employ persons other than those named in the license, their names, the capacity in which it is proposed to employ them, and satisfactory testimonials as to character, as required in Section 528, must be furnished, and permission in writing obtained for their employment.

537. Agents must see that the employees of traders are fit persons to be in the Indian country, and that the rules respecting permits for such employees have been complied with, and if any of them are found to have objectionable habits, the fact must be immediately reported to the Indian office, when steps will be taken to have them removed.

538. The principals of trading establishments will be held responsible for the conduct and acts of the persons in their employ in the Indian country; and an infraction, by such persons, of any of the terms or conditions of a license or any of the laws or regulations, will be considered good and sufficient cause for revoking the license, in the same manner as if the offenses were committed by the principals themselves.

539. Agents must familiarize themselves with the laws and regulations governing the business of licensed traders and see that they are strictly complied with. Any infraction of the laws or regulations, or of any of the terms and conditions of a license, with all the circumstances connected therewith, and any improper conduct on the part of traders, or persons in their employ in the Indian country, must be reported without delay by the agent to the Indian office.

540. On January 1, and July 1 of each year the agent shall submit to the Indian office a statement showing whether and to what extent, each licensed trader has or has not complied with the laws and regulations governing trade with Indians.

541. If persons carry on trade within a reservation with the Indians without a license, or continue to trade after the expiration of the license without applying for renewal, agents will close the stores of such traders and immediately report the facts in the case to the Indian office, in order that legal steps may be taken to enforce the penalties of the law.

542. Licenses will be revoked by the Commissioner of Indian Affairs whenever, in his opinion, the persons licensed, or any persons in their employ, have transgressed any of the

laws or regulations made for the government of trade and intercourse with the Indian tribes, or have so conducted themselves that it would be improper to permit them to remain in the Indian country.

543. No trade with Indians is permitted at any other place than that specified in the license. Licenses do not cover branch stores. Such stores are not allowed, as the business of a licensed trader must be managed by the bonded principal and not by an unbonded subordinate.

544. Traders must actually carry on the business themselves, and habitually reside upon the reservation where they are licensed. They will not be permitted to farm out, sublet, transfer, or assign the business to others. The presence of a silent partner, not under bond, in any trading establishment will be considered sufficient cause for the revocation of the license.

545. Traders and all persons employed by them will confine themselves to their legitimate business according to the license issued. A license to trade with Indians does not confer upon the trader any rights or privileges in respect to herding or raising cattle upon the reservation. Use of reservation lands, whether tribal or allotted, for such purposes can be obtained by a trader only upon the terms and under the restrictions which apply to other persons. His license gives him no advantage over others in this respect.

546. License to trade does not confer the right to traffic in any uniform clothing, other than that of the United States, nor any medals, flags, arm bands, or other ornaments of dress bearing the figures, emblems, or devices of any foreign power, nor does it authorize any trade with a tribe or tribes with whom intercourse may have been prohibited by the President of the United States, or who are engaged in hostilities.

547. Traders are forbidden to buy, trade for, or have in their possession any annuity or other goods of any description that have been purchased or furnished by the Government for the use or welfare of the Indians.

548. If any trader, his agent, or any person acting for or under him, shall sell any arms or ammunition at his trading post or other place within any district or country occupied by uncivilized or hostile Indians, contrary to the rules and regulations of the Secretary of the Interior, such trader shall forfeit his right to trade with the Indians, and the Secretary shall exclude such trader, and the agent, or other person so offending, from the district or country so occupied (Sec. 2136, R. S.).

549. License to trade does not confer the right to traffic in or to have in possession any description of wines, ale,, beer, cider, intoxicating liquor, or compound composed in part of alcohol or whiskey.

550. Traders must see to it that no intoxicating liquor is allowed on or about their premises under any pretense. A violation of this rule by traders or a failure on their part to use their utmost efforts to suppress traffic in or use of intoxicating liquors, or to notify the Indian Office in regard to it, will subject them to revocation of license and removal from the reservations.

551. The sale of the mescal bean, or any product thereof, by traders is positively prohibited.

552. Traders are not permitted to keep their places of business open on Sunday. Violation of this rule will be considered sufficient cause for the revocation of a trader's license.

553. Gambling, by dice, cards, or in any way whatever, is strictly prohibited in any licensed trader's establishment or on the premises.

554. Before any goods are offered for sale, traders shall exhibit to the agent the original invoices of the goods intended for sale and also the bills of lading therefor, together with the price at which each article is to be sold; and it is the duty of the agent to see that the prices are fair and reasonable.

555. Invoices of purchase for the replenishment of the trader's stock, as well as the bills of lading for the same, must be submitted to the agent in the same manner and for the same purpose as is provided in the preceding section for the original purchase of stock.

556. The trader shall keep an itemized ledger, which shall give such description of the articles charged to each Indian that they can be easily and positively identified on the invoice showing the original cost of such articles. The quantity and the price per pound, per yard, per bushel, etc., shall be stated. The amounts credited to each Indian shall also be itemized so as to show every cash payment made and every credit allowed for articles sold or services rendered by him, the kind, quantity, and price allowed for each article sold, as well as the character and amount of labor performed, and the rate of compensation allowed therefor, to be stated.

557. Not exceeding the following rates of profit may be allowed traders on goods and supplies sold to Indians, after adding the expense of transportation to the first cost or invoice prices:

Dry goods, including blankets, woolen goods, shawls, hosiery, bed quilts, cotton goods, yarns etc., 25 per cent.

Ready made clothing, including underwear, 25 per cent.

Boots and shoes and rubber, goods, 30 per cent.

Hats and caps, 30 per cent.

Notions, including beads, twine, gloves, etc., 35 per cent.

Groceries, including canned goods, an average of 20 per cent.

Crockery lamps and glassware, 25 per cent.

Furniture and wooden ware, 25 per cent.

Harness, saddles, leather, etc., 25 per cent.

Miscellaneous articles, including clocks, sewing machines, churns, brass kettles, cornshellers, fanning mills, feed cutters, etc. 20 per cent.

All kinds of agricultural implements, 20 per cent.

Flour, meal, grain, etc., 20 per cent.

Wagons and wagon fixtures, 20 per cent.

Paints and oil, 30 per cent.

Stoves, hollow ware, tinware, stamped ware, 25 per cent.

Hardware, including nails, glass, grindstone, rope, horse-shoes, etc., 25 per cent.

Patent medicines, the regular established retail price.

558. At least three written or printed copies, in both English and Indian (if the Indian language has been reduced to writing), of all the leading articles kept on sale, with the price of each article, must be conspicuously posted about the agency, and one copy thereof must be posted in each trader's store. At least twice each year the trader must furnish the agent with a list of prices charged for staple articles.

559. The quality of all articles kept on sale must be good and merchantable.

560. Traders' weights shall conform to either Fairbank's or Howe's scales.

561. If credit is given Indians by a trader, he must take the risk of his action; no assistance in the collection of alleged claims will be given him by the agent. But whenever Indians obtain goods of the licensed trader on credit, they are expected to pay for the same promptly, in the manner and at the time agreed upon.

562. Traders must not pay Indians in tokens, tickets, store orders, or anything else of that character. Payment must be made in money, or in credit, if the Indian is indebted to the trader.

563. Indians must be permitted to sell their crops or other articles produced by them at available market towns, precautions being taken to guard them against fraud or obtaining intoxicating liquors."

An examination of said sections of the United States statutes as above set forth and the rules and regulations promulgated thereunder, it would seem, could have no other effect than to convince the court beyond a shadow of a doubt that the Act of Ewert in purchasing land could not possibly have been within the contemplation of the lawmakers of this country when in 1834, that Act as it now stands, with the exception of the change in verbiage hereinbefore stated, was first enacted into law.

A reading of them must convince the court that the entire Act related only to the licensing of traders and that the "trade" mentioned in Section 2078, referred only to that class of transactions and can under no circumstances be stretched far enough to include the transaction now before this court.

To take these up section by section would needlessly lengthen this brief. However, the court is respectfully asked to read and consider each section.

Consider the first Section No. 517, which is a part of the Act of August 15, 1876. That section empowers the Commissioner of Indian Affairs to appoint "*traders*" and to make rules and regulations specifying the kind and quantity of goods, the price at which such goods shall be sold to the Indians, etc.

Then comes the section here under consideration, to-wit: Section 2078. This section names persons who shall not have trade with Indians. In other words, persons to whom the Government shall not issue licenses to establish trading posts.

Section No. 519, is taken from 22 Stats. 179, and provides that no person other than an Indian of full blood who has not been granted a license "shall act as a trader," and is prohibited from introducing goods or to *trade* therein, and prescribes a penalty.

Section 520, which became Section 2135, of the Revised Statutes, prohibits any person from trading or bartering with Indians relative to any of the instruments which they use in hunting, or for cooking, or their clothing, and provides a proper penalty.

Then follows the statutes prohibiting the trading in intoxicating liquors in the Indian country. Then come paragraph Nos. 524, 525 and 526, defining the class of people who may be licensed as traders, etc.

With these rules and regulations before the court, it would seem that the court would irresistibly be drawn to the conclusion that

the sole purpose of the Acts of Congress of which Section 2078, is a part was to permit the establishment of so-called "*trading posts*" and saying who would be entitled to receive licenses to establish these trading posts and who would not, together with the rules and regulations promulgated thereunder.

The Act itself in every detail points to that conclusion, even going to the extent (Sec. 557) of saying just how much profit shall be allowed and how the goods shall be weighed. The law itself is further considered in another portion of this brief.

Both the Attorney General and the Secretary of the Interior of the United States both before and after the approval of the deed declared that Ewert was within his lawful rights and acted within the law.

Both the Attorney General and the Secretary of the Interior of the United States at the time the complained of sale of land was made by the United States to Ewert, after careful consideration of the matter, declared that Ewert was within his lawful rights in purchasing the land, and that the conveyance to Ewert was valid. This view has been adhered to by their successors in office. Attorneys General have also in construing like statutes, held that Special Assistants employed as Ewert was employed, were employed in *legal matters* rather than by or in behalf of any departmental work.

Ewert's contract of employment is as follows:

"Sir:

You are hereby appointed a Special Assistant to the Attorney General to assist in the institution and prosecution of suits to set aside deeds made to certain allotments in the Quapaw Indian Agency.

Your compensation will be at the rate of per month, commencing when you enter upon duty, at which time you should execute and forward the necessary oath of office.

Your official residence is fixed at Miami, Oklahoma, and when absent from that place on official business you will be allowed your actual necessary expenses of lodging and subsistence, and your actual traveling expenses, as provided by the department's orders dated September 1, 1907, a copy of which is herewith enclosed.

This appointment is subject to any change which may be made by this Department.

Respectfully,

(Signed) CHARLES J. BONEPARTE,
Attorney General."

Section 2078, R. S. reads as follows:

"No person employed in Indian affairs shall have any interest or concern in any trade with the Indians except for and on account of the United States, and any person offending herein shall be liable to a penalty of five thousand dollars and shall be removed from his office."

"Mr. Ewert is an employee of your Department detailed by the Department of Justice."

(From letter of Frank Pierce, First Assistant Secretary of the Interior to the Attorney General under date of June 26, 1909, Rec. p. 63).

"In this connection it may be observed that Mr. Ewert *is not an employee of the Indian Office* and in strictness *was within his legal rights* in bidding on the land in question."

(From letter of Secretary of the Interior, Fisher, to Congressman Davenport, June 8, 1911, Rec. p. 63.)

"At that time (referring to the date of the interview between Ewert and Wickersham before the approval of the Bluejacket deed), I told Ewert that *I saw no legal reason why he should not purchase the land in question.*"

(From letter of Attorney General Wickersham to R. A. Ballinger, Secretary of the Interior, Dec. 21, 1909, Rec. p. 64.)

"The case (sale of the Bluejacket land) has been carefully investigated and it appears from the papers in the case that *MR. EWERT ACTED WITHIN THE LAW* and there is no suspicion of fraud in the transaction."

(From letter of Commissioner of Indian Affairs, dated July 19, 1909, Rec. p. 75.)

"Mr. Ewert, being *an employee of the Department of Justice*, a copy of this letter has been sent the Attorney General for his information."

(From letter of Assistant Secretary Pierce of Attorney General, November 19, 1909, Rec. 75.)

"There are the only additional facts learned since the deed was presented for approval last June. *At that time I told Mr. Ewert that I saw no legal reason why he should not purchase the land in question.* * * * I have no doubt, however, that if I should request it he would re-convey the property to the Government upon receiving back his purchase money, and

if you think it desirable to make that request of him I shall do so; although I should prefer not to, in view of the action taken in June and above referred to."

(This is corroborative of the testimony of Ewert offered at the trial, that before the approval of the deed he advised the Attorney General and the Secretary of the Interior that he was the purchaser and was advised by them that they knew of no legal reason why he should not purchase the land.) (From letter of Attorney General Wickersham to R. A. Ballinger, Secretary of the Interior, Dec. 21, 1909, Rec. 75-76.)

"The lands purchased by Paul A. Ewert, Special Assistant Attorney General, have no particular value as mining lands and he paid substantially the market value of said lands at the time he purchased the same through Superintendent Ira C. Deaver at open market sale under competitive sealed bids; that there was no collusion in the purchase of said lands through said agency, the same having been appraised prior to Mr. Ewert's coming to Oklahoma, and advertised and re-advertised for a period of some nine months prior to the sale."

(From report of Special Agent Leinen, of the Department of the Interior of March 26, 1910, Rec. 78.)

"On receiving your letter of the 26th *ult.* I communicated at once with Mr. Paul A. Ewert who was here, and have received from him an explanation with respect to the purchase of the land described in the deed referred to in your letter which, it seems to me, *FREES HIM FROM ANY OFFENSE IN THE TRANSACTION.*"

(From letter of acting Attorney General, Wade Ellis, to Frank Pierce, acting Secretary of the Interior, July 2, 1909, Rec. p. 80.)

"I beg to say that the practice of the Department for many years has been to regard attorneys who have been employed specially in some particular cases as not being within the language of the section referred to."

(Opinion of Attorney General Bonaparte, May 8, 1907, construing Section 1782, of the Revised Statutes, Penal Code, 1910, Sec. 113.)

"The statute being penal must be strictly construed. The only word therein which could be claimed as applicable to you is the word 'officer' and because there is in your employment

neither duration and continuance of duties, nor duration and continuance of term, you would not be regarded as an officer within either the spirit or the letter of this statute."

(From opinion of Attorney General Gregory, December 2, 1914, construing Section 113, Penal Code, 1910.)

The Circuit Court of Appeals committed a fundamental error in treating the sale of the lands involved as a sale and purchase between the Indians and the defendant Ewert rather than as a sale by the United States acting as guardian

Counsel for the defendant, Ewert, contends at the very onset that the Circuit Court of Appeals committed a fundamental error in treating the sale of the lands involved in this suit as a sale of land from the Indian heirs to Ewert. The court went wrong in this respect at the very beginning of its findings. The truth of the matter is that this transaction was never had between Ewert and the Indians. The evidence shows that he never dealt with them in any respect; that he had never seen them; that he had never talked with them or corresponded with them concerning the sale. The Court of Appeals in its opinion says:

"It is not shown that the defendant ever saw or communicated with any of the plaintiffs or that the Indians were conscious that Ewert was employed in Indian affairs."

Ewert saw the lands advertised for sale in the newspapers and by posters, and sent in his sealed bids to the Secretary of the Interior through his agent at Wyandotte, Oklahoma. The sale was then made under and pursuant to the rules and regulations promulgated under the Act of Congress permitting the sale of inherited Indian lands by Quapaw Indians. The deed was in effect a deed from the Secretary of the Interior to Ewert. Every step in the proceedings from the time the application for the sale was made by the Indians was a step taken by the Secretary of the Interior or one of his authorized agents. The land was restricted Indian land. The Indians could not of their own right, make the sale. The United States made the sale for them. It is expressly held in this case of

United States v. Noble, 237 U. S. 74.

"That the Quapaw Indians are still under national tutelage; that the guardianship of the United States continues notwithstanding the citizenship conferred upon the allottees."

This right was expressly reserved to the United States by Section 1, of the Enabling Act providing for the admission of Oklahoma and Indian Territory into the Union as a State.

Six of the heirs who signed the deed were adults, and six of the heirs conveyed through their respective guardians. The deed would have been absolutely void had not the sale been made by and with the consent and approval of the Secretary of the Interior of the United States. His signature to the deed was absolutely necessary to make a valid conveyance, under the circumstances. The Indians themselves had nothing whatever to do with the sale. The guardianship of the Government was absolute. The United States had the final say; the United States delivered the deed; the United States as the guardian, under the rules and regulations, received the money and in the capacity of guardian disbursed the money to the grantors named in the deed. It reserved in itself the right to say when it should pay the consideration to the Indians. It is submitted that the transaction should have been treated as a transaction between Paul A. Ewert, employed, under all the decisions of the Attorneys General, *in legal affairs*, and the United States as guardian for these Indians.

It should further have been treated as coming within the purview of the exception contained in Section 2078, to-wit: "As a sale for and on account of the United States."

In failing so to do, the Circuit Court of Appeals committed error.

Further, the Circuit Court of Appeals in treating this sale as a sale directly from the Indians to Ewert, overlooked the provision found in the Act of Congress of May 27, 1902, quoted in full in the opinion of the court (*Bluejacket v. Ewert, supra*, 825) reading as follows:

"But in case of minor heirs, their interests shall be sold only by a guardian duly appointed by the proper court upon the order of the court made upon petition filed by the guardian, but all such conveyances shall be subject to the approval of the Secretary of the Interior."

The record discloses in this respect that six of the heirs were minors and that in the form required by law a petition was filed by the two guardians of the several minors, to-wit: William, Blanche, Amy and Clyde Bluejacket, by their guardian Carrie Bluejacket, and

by the minors, Cora LaFalier and Louis Pascal, by their guardian L. A. LaFalier (Rec. 142-145), and that an order of sale was in due form made by the court directing such sale to be made (Rec. 146-149).

It will thus be seen that the so-called "trade" of Ewert with the Indians resolves itself into being a trade or transaction entirely between the United States, acting as the guardian of the adult Indians, and by both the guardians under the state law and the United States as guardians of the minor heirs. The failure of the Circuit Court of Appeals to so find and so decree, is reversible error.

The Circuit Court of Appeals erroneously held that the defendant Ewert was employed in "Indian Affairs" so as to bring him within the purview of the statute.

It must be admitted that the opinion of the Circuit Court of Appeals contains numerous loose statements and contradictory expressions. Examine for instance, the expression of the court wherein it recites the facts upon which it bases its conclusion that Ewert was employed in "Indian affairs." Paragraph 2 of that opinion reads as follows (*Bluejacket v. Ewert*, 265 Fed. p. 827) :

"All the facts shown in evidence in relation to Mr. Ewert, the defendant, *that are claimed* to bring his purchase within the condemnation of this statute may be shortly stated. Mr. Ewert was an attorney at law formerly residing in Minnesota. On October 23, 1908, the Attorney General of the United States appointed him as a special assistant to the Attorney General to assist in the institution and prosecution of suits to set aside deeds made to certain allotments in the Quapaw Indian Agency. His official residence was fixed at Miami, Oklahoma. He removed to Oklahoma, going first to Muskogee and remaining there the greater part of November. About the 1st of December he moved to Miami and appears to have continued to reside there for some months thereafter. *These facts sufficiently show that he was employed in Indian affairs*" (italics ours).

Section 2078, the statute in question, is a highly penal one. The penalty provided for is removal from office and a fine of five thousand dollars. Conspiracy to violate this statute if entered into by two or more persons, would mean a penitentiary punishment. Would it not be absolutely inhuman, not to say ridiculous, to send a man to the penitentiary upon the statement of facts found by

the court hereinbefore recited? But the truth of the matter is that the facts recited by the court are all the facts. Not a line of testimony was ever even offered to show that Ewert's employment was anything other than that named in his letter of appointment. The true facts are that up to the time this sale was made to Ewert and the deed was approved, he did not institute any suits or perform any services whatsoever for the Government under authority of the Government, except to prepare certain petitions in what was commonly known as "Marshal's Deeds" cases, seeking to have the Federal Court set aside certain deeds of conveyances made in certain partition sales of inherited lands in the Ottawa, Seneca and Shawnee Indian Tribes (not Quapaw Indians), theretofore made by order of the United States Territorial Court, the deeds being signed and delivered by the United States Marshal under direction of the Territorial Federal Court.

There was absolutely no evidence of any kind adduced to show that Ewert was employed in Indian affairs. His employment was purely a legal one and comes directly within the opinion of the Attorneys General with respect to such employment, hereinafter set forth in full.

In order to find that Ewert was employed in Indian Affairs, the Court of Appeals of necessity had to find and did find that he was an "Officer of the Indian Department" within the meaning of the statute. In its opinion (p. 829) the court said:

"If it were held that the statute did not apply to a trade between an *official of the Indian Department* and the Indians except where the Indian was conscious that he was dealing with such an employee the way would be open for *employees and officers of the Indian Department* to take advantage of their knowledge of the Indians' affairs and of their needs, to make purchases or sales for their own benefit through third persons, agents and corporations."

It will thus be seen that the judgment of the court is based upon its finding that Ewert was an *officer of the Indian Department* when in truth and in fact he was employed in *legal matters* in the service of the Department of Justice. In holding that Ewert was "officer" of the Indian Department, the Court of Appeals is in direct conflict with the decision of the Supreme Court of the United States in the case of

United States v. Germaine, 99 U. S., 508.

With due respect for the court, appellant is at a loss to understand why the opinion of the court refers to him as an employee or "officer" of the "Indian Department." In the first place, there is now no such thing as the "Indian Department." The "officer of Indian Affairs" is the title now conceded to the bureau of the Interior Department having charge of Indian matters and is the title appearing on its papers (R. 50).

The record shows that appellant was appointed by the Attorney General, and that officer, as the court, of course, knows, is the head of the Department of Justice. Appellant was employed under such statutes authorizing the Attorney General to employ attorneys and counselors at law. He was paid out of an appropriation to the Department of Justice each year a lump sum appropriation; *e. g.*, see 36 Stats., Pt. 1, p. 750, par. 3, devoted exclusively to such employment.

This reference is to the Appropriation Act in force at the time the deed was taken in 1909, and is as follows:

"For payment of special assistants to the Attorney General and to United States district attorneys employed by the Attorney General to aid in special cases, \$175,000. This appropriation shall be available also for the payment of foreign counsel employed by the Attorney General in special cases."

And this Act is repeated from year to year.

Appellant was therefore under the direction and control of no one but the Attorney General, and fails to understand upon what theory the Honorable Court refers to and considers him "an employee of the Indian Department." Surely not because he was engaged in a class of litigation which might be denominated broadly as "Indian," for in truth the officers and employees of the Department of Justice are engaged in no litigation which does not arise out of the work of one of the several executive departments. The functions of the Department of Justice inherently give rise to no litigation. What, then, is the result of this assumption by the Honorable Court? That the officers and employees appointed under the Department of Justice are officers and employees of the particular department wherein arose the litigation upon which they happen to be engaged, a conclusion which appellant thinks the Honorable Court will speedily disavow, for the havoc which such a holding would quite plainly work would be unending.

In referring to the class of persons affected, the opinion uses interchangeably the terms "employed in Indian affairs" and "employed in the Indian Department." That this is entirely sound is seen by Section 14, of the Act of 1834, from which Section 2078, was taken, which confines the class so affected to persons employed in the "Indian Department." And appellant hopes he does not assume too much in considering that interchange a judicial determination that those only are within Section 2078, who are the Indian "Department," or what was meant by that term in the Statute of 1834. See Act, *post*.

We are not, of course, dealing with the mere generality of the dictionary meaning of the term "affairs," but with the grave concern of how Congress used the term "Indian affairs" in 2078, in expressing a class of persons which it intended to affect by a highly penal statute, and if the court intended to say that the two terms which it uses are equal in scope, then it intended to say that the statute is confined to persons employed in what is now the Office of Indian Affairs, of which appellant plainly is not one, and therefore the decree must go for him.

And it is vital here to say that a statute of a given character is susceptible of but one rule of construction, whether the proceedings be by way of indictment or of civil relief, and even if this case were not penal in character, seeking, as it does, to cause appellant to forfeit his purchase, the statute itself is penal and therefore subject to strict constructions. There is, of course, no such thing as both a broad and a strict construction of the same statute.

That all officers of Indian affairs conceded appellee was not in that service, see letter of Valentine (R. 50); letter of Secretary Fisher (R. 63); letter of Assistant Secretary Pierce (R. 75).

But should there be any inclination by the court to say that the opinion means that the statute applies to all persons in the government service who may perform work which in any way touches an Indian, regardless of the department or bureau by or in which they may be so employed, we proceed to show that the statute distinctly does not so apply.

Under this head it is respectfully submitted that the Court of appeals seems to have been guided somewhat by its sense of economy. We think the case is susceptible of certain wholesome principles of statutory interpretation which have become almost as

fixed in their operation as the laws which govern the planets. As said by the eminent Judge Carland in the Douglass case :

"It may be that it would be wise to prohibit the purchase of cattle from Indians by persons employed in Indian affairs, but the court cannot supply needed legislation by construction of present laws."

But it will be shown hereinafter that to extend the statute beyond employees of the Indian Office by legislation would be impracticable.

It is true, the two cases do not present the same question and that the appellate court differed with Judge Carland on the construction of 2078 as bearing on that case, but the principle of the above utterance is applicable here and is one of the cornerstones of American jurisprudence; one of the pillars, indeed, upon which our government structure rests, sustaining the independent action of the three branches. The opinion does not *show* that appellant was "a person employed in Indian affairs;" it *assumes* it. It is admitted that appellant's brief is deficient in this respect. It may be, indeed, that he is responsible; but so far from excluding him that account, it is one of the very reasons for the exercise of that wise and just instrumentality. It may be assumed, indeed, that it is the chief reason, since the office of the attorney is to relieve the court of the stupendous task of research, as far as that may be done by the knowledge, industry and resource of the former.

That appellant was not such a person is shown by the fact that

The term "employed in Indian Affairs" in the statute indisputably means "employed in the Office of Indian Affairs."

In construing any part of the United States Revised Statutes it is admissible and often necessary to recur to its connection in the Act of which it originally was a part.

U. S. v. Hirsch, 196 U. S. 1.

U. S. v. Bowen, 100 U. S. 508.

Victor v. Arthur, 104 U. S. 498.

If there be any ambiguity in a section of the Revised Statutes, resort may be had to the original statute from which the section was taken to ascertain from the language and context to what CLASS OF CASES the language was intended to apply.

The Conquerer v. Stevenson, 215 U. S. 190.

The history of prior legislation upon the same subject may be considered in determining the intention of Congress in passing a law.

U. S. v. Stevenson, 215 U. S. 190.

On July 9, 1832 (4 Stat. 564), Congress provided as follows:

"The President shall appoint, by and with the advice and consent of the Senate, a COMMISSIONER OF INDIAN FAIRS, who shall, under the direction of the Secretary of War, have management of Indian affairs and all matters arising out of Indian relations."

On June 30, 1834 (4 Stat. 738), Congress passed an Act entitled:

"An Act to provide for the organization of the Department of Indian Affairs."

Every section of that Act is, of course, devoted to what its title implies, and nothing else. It provides for "Superintendents of Indian Affairs" and other officers and employees under a specific bureau for the conduct of such work, which was then under the control of the Secretary of War. Section 14 of that Act provides:

"That no person employed in the *Indian Department* shall have any interest in any trade with the Indians except for and on account of the United States; and any person offending herein shall forfeit the sum of five thousand dollars, and upon satisfactory information of such offense laid before the President of the United States, it shall become his duty to remove such person from the office or situation which he may hold."

If we were to stop at this statute we would most *certainly* be limited to a person "employed in the *Indian Department*," or its present equivalent, and by no stretch could its provisions be extended to the other departments or bureaus of the Government; otherwise there would have been no reason for the limitation of the *Indian Department*.

Section 462, Revised Statutes, provides:

"There shall be in the Department of the Interior a COMMISSIONER OF INDIAN AFFAIRS, who shall be appointed," etc.

Section 463:

"The Commissioner of INDIAN AFFAIRS shall, under the direction of the SECRETARY OF THE INTERIOR, and agreeably to such regulations as the President may prescribe, have the management of INDIAN AFFAIRS and matters arising out of Indian relations."

When the Revised Statutes were adopted, the term "Department" was dropped from the Act of 1834 (see Section 2078) evidently because the term was incongruous and incorrect as applied to anything less than the units of the executive branch presided over by a member of the cabinet. In *U. S. v. Germaine*, 99 U. S. 510-511, the Supreme Court said this very thing of the term as used in the Constitution and said that the heads of "departments" were necessarily

"something different from the inferior commissioners and bureau officers, who are themselves mere aids and subordinates of the heads of departments."

And the court said that it means only such as the "Treasury Department," "Department of Justice," etc. From the first Revised Statutes, which was in 1875, down to the present time, the word has not been used in the laws of Congress in any other manner. And it may well be doubted that Congress ever used the word in any other sense except in the Act of 1834. The abandonment of the word as to Indian affairs has been followed by a departmental use of the term, "Office of Indian Affairs" (R. p. 50). And although the term "Office" does not seem to have been commanded by Congress, it recognized the use of it in one instance (9 Stats. 587, Sec. 9), where it appropriates for a "chief clerk in the Office of Indian Affairs" (Act Feb. 27, 1851). Since the Act of 1834 the word "department" has not once been used legislatively as to Indian affairs. It has been so used in indices to legislation, which is done by a clerk in the State Department, but that use is purely clerical and as to Indian affairs is evidently a relic of the Act of 1834.

But the term "Indian affairs" has been consistently used in referring to that bureau from the beginning of the government, as the yearly appropriations and other legislation will show, using the words in connection with "department" in the title of the Act of 1834, but never thereafter (and never before, apparently) with the

word "Office" in the Act of 1852, and the term "Indian Affairs" alone in many others, including Section 2078.

The caption under the title "Indians," XXVIII, R. S., is as follows:

"OFFICERS OF INDIAN AFFAIRS: THEIR DUTIES AND COMPENSATION."

And then follow Sections 2039 to 2078, which codify, among others, the statutes reviewed by Judge Carland. And the commissioners appointed "to revise and consolidate the permanent laws of the United States" declare by the marginal note that they took 2078 from Section 14 of the Act of 1834, the title and scope of which have been given above. The title of that Act followed the words "Indian Affairs," which had consistently been given to the bureau, its agents and superintendents, and then to the commissioner in 1832. Of course, the title of an Act may be referred to. 164 U. S. 526; 178 U. S. 41.

Could anything be plainer than that the Act of 1834 was carried into 2078 as applying to a "person employed in Indian affairs" in exactly the same sense as it had originally been applied to "a person employed in the Indian Department" in the Act of 1834, with its consequently plain limitation to persons employed in that "department" or bureau? That was a change in the statute as codified and the question for the court is whether it was to create a new class of people to be penalized or was merely to abandon the word "department" as applied to that bureau and to substitute the word "affairs" to make the section consist with the descriptive words in the title of the Act of 1834, even following capitalization, and that of the commissioner and other officers as commanded in the organic acts. The word "office" had not been commanded, which explains why the codifiers did not use it.

And the vital point here is this: That Congress intended no substantial change in compiling the Revised Statutes. In *Murdock v. Memphis*, 20 Wall. 617, it is said:

"This view is strongly supported by the consideration that the revision of laws of Congress passed at the last session (referring to the first revision), based upon the idea that no change in existing law should be made, has incorporated with the Revised Statutes nothing but the second section of the Act of 1867."

This refers to the claim that an Act passed prior to December 1, 1873, amended Section 2 of the Act of 1867, to which the court was referring. December 1, 1873, marked the date as to which the statutes were codified, which means, as the court knows, that the Revised Statutes are the law as it existed on that date WITHOUT CHANGE.

"It was declared purpose of Congress to collate all statutes as they were on that date and not to make any changes in their provisions."

Smythe v. Fisk, 23 Wall. 382 (referring to Dec. 1, 1873).

"The Revised Statutes must be accepted as the law on the subjects which were embraced as it existed on December 1, 1873."

U. S. v. Bowen, 100 U. S. 508.

Cambria Iron Co. v. Ashburn, 118 U. S. 57.

U. S. v. Auffmordt, 122 U. S. 209.

If the language of the Revised Statutes is doubtful, reference may be had to the original statute.

Deffeback v. Hawke, 115 U. S. 402.

U. S. v. Stevenson, 215 U. S. 190.

So that the court is bound by the law as it was on December 1, 1873, with liberty to refer to that law to clear up a doubt in the revision. And under general principles it is well settled that in a revision or consolidation no change is intended unless it is clearly expressed.

U. S. v. Le Bris, 121 U. S. 278.

Anderson v. Pac. Coast S. S. Co., 225 U. S. 199.

Logan v. U. S., 144 U. S. 263.

U. S. v. Mason, 218 U. S. 199.

Potter v. Bank, 102 U. S. 163.

McDonald v. Hovey, 110 U. S. 619.

In *U. S. v. Ryder*, 110 U. S. 729, 740, the court says:

"The revisioners would not have proposed, nor would Congress have made, such a fundamental change in the law as the extension of these provisions to criminal cases without employing more proper terms for that purpose than this section contains. It will not be inferred that the Legislature, in revising and consolidating laws, intended to CHANGE THEIR POLICY UNLESS SUCH INTENTION BE CLEARLY EXPRESSED."

The court seems to have waived, in the above case, the fact that no substantial change at all was intended by the revision. If that was not absolute, the presumption at least is certainly to that effect. However, we waive for the moment the same fact and ask: Is it clearly manifested that Congress, in 2078, intended to extend the Act of 1834 beyond the limits to which it had been so naturally confined? Is it clearly manifested that in the numerous and complex relations between the various departments Congress intended that every person in every department who should touch a class of work, or even one matter, for the statute makes no degree, which could be termed "Indian," would be the subject of a highly penal statute; or is it clearly manifest, at least is it not probable, that all it did was to abandon the word "department" for the reasons stated? And even if it were not apparent, the reason is something with which the court need not concern itself, since it is bound by the rule laid down by the Supreme Court in the *Ryder* case. And is not the latter the correct view when we look at TITLE XXVIII and see that it is the organic act of the bureau presided over by the Commissioner of Indian Affairs and that every section in it, from 2039 to 2077, is devoted to the duties and conduct of officers and agents subject to the appointment, control and direction of the Commissioner of Indian Affairs, acting under the Secretary of the Interior? And is it not beyond peradventure that 2078 refers only to the personnel of that organization?

To show this court the extent to which this implied subjection to a high penalty would go, a clerk in the auditor's office of the Treasury Department employed to adjust Indian accounts is as much within its provisions as an attorney employed by the Department of Justice to cancel some deeds to Indian lands unlawfully made by a marshal, which is the case at bar. An employee of the Department of Agriculture who prepares bulletins as to whether the Indians can raise cotton on their lands is in the same category; so is a geologist of the geological survey, a bureau of the Interior Department, who examines Indian lands that the Indians may know its mineral value. Examples without end could be mentioned. There is not another bureau or department of the Government mentioned in the Revised Statutes whose title contains the word "affairs," or which is even referred to by that word, yet opposing counsel would have the court believe that the term was a mere dictionary use.

Either the employees of every department of the Government come within the court's decision or that decision should be reversed.

This is true because a line cannot be drawn except at the Office of Indian Affairs. Where else can it be drawn? Is the Department of Justice the one other department to be subjected to the Act? If so, upon what is the distinction founded? To show Your Honors that Congress would have specified the other department had it so intended, Your Honors are respectfully referred to Supp. R. S. Vol. 1, p. 67, Sec. 10, which is as follows:

"That no agent or employee of the United States Government, of any of the executive departments thereof, while in the service of the Government, shall have any interest, directly or indirectly, contingent or absolute, near or remote, in any contract made, or under negotiation, with the Government, or with the Indians, for the purchase or transportation or delivery of any goods or supplies for the Indians, or for the removal of Indians" (prescribing penalties, etc.).

Here is the deadly parallel. We need not stop to consider reasons for the distinction between this Act and 2078. We are not permitted to do so because the statute is plain, and it shows that when Congress means to subject the personnel of the whole Government of the United States to a prohibition or a penalty, it says so. It does not, when it so intends, speak of persons "employed in 'Indian affairs'" or "naval matters" or "pension matters" or "public land matters." It could not do otherwise knowing, as it does, that the American system of jurisprudence, as built and nurtured by the great American jurists, defends the right of a given person to be exempt from a penalty unless Congress has unmistakably said he should be otherwise.

The statute either embraces all persons in the Government or is confined to those in the Office of Indian Affairs. There is no middle ground; therefore the criterion of influence over the Indians, merely because of the position held by appellee, is not sound.

The alternative stated in the caption was squarely before the court. We assume the court held the first view, and we have shown, we think, that the view is not what Congress intended. If the court did not intend to say that Section 2078 added to the Act of 1834 all other persons in the Government service whose work

might touch an Indian, then the court necessarily says that it applies to all such persons whose position is such as to "wield an influence, and that appellant is in the class, not merely because he was engaged in work which might be denominated "Indian" work, but upon the theory that the employment to set aside some deeds to Indian laws unlawfully made by a marshal was such as to control the will of the Indian in selling his inherited land through the agent and the Secretary of the Interior. *But the statute makes no such thing the criterion.* Its gravamen are but two: A trade with an Indian, and that the trade is made by a person employed in Indian affairs. And the criterion set up by the court invariably means judicial legislation, *because what does or does not involve the wielding of influence is purely a matter of economic sense, which, of course, is highly elastic and depends entirely upon the particular judge before whom the case may come.* Congress made no such delegation by the statute, and if it did would not be constitutional.

It is respectfully insisted that Congress meant one of two things and nothing more: That the statute applies to all persons in the Government service whose services might touch an Indian, or it meant to confine Section 2078, as did the Act of 1834, to persons in what it organically made the Office of Indian Affairs. If the latter, the decree must in any event go for appellee.

In truth, every department has one or more statutes prohibiting its employees and officers from transactions within that department; and they are in terms limited to such officers and employees. The reason for such statutes is not that the employee wields an influence over the persons engaged in the transaction, but that it gives opportunity for use of information obtained through close official connection with that particular department. That class of statutes is in truth confined to employees of the bureau having charge of the subject matter. See the Treasury Statute on page 124, appellee's brief; and the Public Land Statute, Section 452, R. S.:

"The officers, clerks and employees in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any public land; any person who violates this section shall forthwith be removed from office."

See Patent Office Statute, 480, R. S.; and Pension Office, 5489, R. S. These three last, with the Office of Indian Affairs,

are the main bureaus of the Interior Department, and we think the court will now see that the four sections are equal in scope. At all events, if Congress intends anything else, it says so, as in the Act (Supp. R. S. Vol. 1, p. 67, Sec. 10) hereinbefore quoted. And it said so there in unmistakable terms, without which the court may not inflict a penalty, we respectfully submit. Of course, there is the general statute which prohibits all officers and employees from prosecuting cases or claims against the United States, but that has no reference to the matters before any particular department. Sec. 1782, R. S.

Section 2078 may have been based upon the idea of influence over Indians, but it yields more readily to the conviction that employees of Indian affairs could know in advance of the payment of annuities, etc., to Indians and thus take advantage of their improvidence, besides overreaching the Government in its plain purpose to provide a means of confiding trade with its wards to itself:

Even if the foregoing review does not convince the court of the limitation of the statute to the Office of Indian Affairs, it fairly must create a doubt, which should have been resolved in favor of appellee.

It scarcely is necessary to say to this court that a penal statute must be strictly construed; *Bolles v. Outing Co.*, 175 U. S. 262. Any doubt as to such statute must be resolved in favor of defendant; *U. S. v. Sheldon*, 2 Wheat. 119. No one can be punished for violation of a statute unless plainly and unmistakably within its terms; *U. S. v. Lacher*, 134 U. S. 624.

And in *Keitel v. U. S.*, 211 U. S. 370, 395, the Supreme Court condemns any construction of an amendment which by implication adds to an existing penal statute a class of offense or of persons not within the original Act if susceptible of any other purpose. And that is exactly what was done, for the effect of the opinion is to say that 2078 added to the Act of 1834, which in terms is limited to the "Department" of Indian Affairs, a class of persons by implication, that is, persons not in the department or Office of Indian Affairs, for, as has been herein said, an appointee of the Department of Justice is assuredly not a person employed "in the Department of Indian Affairs." In the *Keitel* case the original statute was Section 4746, R. S., which punishes the "making of a false or fraudulent affidavit concerning any claim

for pension or bounty land or the employment thereof, or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions." An amendment of July 7, 1898, added to the section the words "or of the Secretary of the Interior." By the Government it was contended that under the amendment an indictment lay for a false affidavit before the Secretary of the Interior in making of a coal land entry because the amendment was sweeping in its terms and embraced every matter within the jurisdiction of the Secretary. By the defendant it was said that the amendment was because of the overlying control of the Secretary over pension and land bounty claims and the resultant fact that such matters might come before him as well as the subordinate Commissioner of Pensions, and that without a *manifest intention by Congress*, clearly expressed, that a new class of offenses was to be added to a penal statute, that construction should prevail. Said Mr. Chief Justice White:

"It was said by the United States in argument, and it could not have been in reason denied, that the section in question as originally embodied under the head of 'Pensions' in the Revised Statutes, related exclusively to pension or bounty land claims. No crime, therefore, could have been predicted under the original section upon the affidavits and other papers used in making coal land entries as alleged in the indictment. * * * The argument as to the broad scope of the statute in its present form rests, therefore, upon the proposition that because the amendatory statute, in repeating the original words (quoting the material portion of Section 4746), adds to them the following, viz.: 'or of the Secretary of the Interior'; therefore the statute now embraces not only acts done in connection with pension or bounty claims, but all acts of the prohibited character as to any matter coming before the Secretary of the Interior or subject to so come, entirely without reference to whether they were in pension or bounty claim proceedings.

But to adopt this latitudinarian construction would cause the statute to create a multitude of new and substantive crimes. * * * when the original text and the amendment are taken into consideration the conclusion becomes inevitable that the purpose of the amendment was to more fully deal with the subjects with which the provision which was amended dealt."

Thus, the court rejected the contention that the amendment added, without clear words to that effect and because another

ground could be found, a new class of Acts subject to penalty. Here the court, it is thought, has added to the original statute a new class of persons subject to the penalty, evidently on the theory that Congress impliedly intended that addition by revision into Section 2078, when the only change made is the dropping of the word "department," which was necessary because, as shown by the revision throughout, the executive branch had become organized into well defined units, to be known as "departments," each presided over by a member of the Cabinet. So the addition of this new class of persons, which the decision at bar unquestionably means, is, it seems to counsel, much more violent even than the Keitel case.

If this rule applies with such vigor to an ordinary amendment, with how much greater force must it apply to a codification and revision by commissioners?

The court erred in not holding that special assistants to the attorney general are not within the statutes restricting Government employees in professional or commercial matters.

Attorneys so employed are in the same category as a painter or a builder or any other person employed to do a specific piece of work. The attorney general holds that they are not subject to 1782 R. S.. Certified copies of the opinions which follow have been filed in this case:

"May 8, 1907.

Charles R. Bosworth, Esq.,
Ernest and Cramer Building,
Denver, Colorado.

Sir:

Answer to your letters of April 9 and 24 in relation to the execution of the oath of office under your appointment as Special Assistant to the United States Attorney for the District of Colorado has been unavoidably delayed.

Therein you state that under this appointment you are to aid in a suit to be brought by the Orlando Canal and Reservoir Company, in the name of the United States, to secure the forfeiture of grant of right of way acquired by the Pope and Shoman Reservoir, and ask whether the fact of your being attorney for the Orlando Canal and Reservoir Company would in any way disqualify you from acting as Special Assistant to the United States Attorney by virtue of anything contained in Section 1782 of the Revised Statutes. While the Attorney General is not authorized to give an

official opinion upon a question of law unless it is submitted by the President or by the head of an Executive Department, nevertheless it seems proper, under the circumstances of the case, for your guidance in connection with the appointment which you have received, to answer the question submitted.

In response, therefore, I beg to say that the practice of the Department for many years has been to regard attorneys who have been employed specially in some particular case as not being within the language of the section referred to; and, furthermore, that that section, by its language, of course has no application to cases pending in any court. Your question is therefore answered in the negative.

Respectfully,

(Signed) CHARLES J. BONAPARTE,
Attorney General."

"December 28, 1914.

Robert W. Childs, Esq.,

Special Assistant to the Attorney General,
New York Life Building,
Chicago, Illinois.

Sir:

I acknowledge receipt of your letter of the twenty-sixth instant wherein you ask whether your acceptance of special employment as a Special Assistant to the Attorney General to render service in trial of specified cases pending in various United States District Courts, and involving the prosecution of criminal charges growing out of the alleged violation of oleomargarine laws, would bring you within the operation of Sec. 113 of the Penal Code of 1910.

I am of the opinion that it would not; and for these reasons:

The fact that you make an oath upon appointment is not necessarily determinative of the question. 17 Ops. 419. The statute, being penal, must be strictly construed. The only word therein which could be claimed as applicable to you is the word 'officer' and because there is in your employment neither duration and continuance of duties, nor duration and continuance of term, you would not be regarded as an officer within either the spirit or the letter of this statute. 2 Comp. Dec. 271; 26 Ops. 247; *United States v. Germaine*, 99 U. S. 508.

Respectfully,

(Signed) T. W. GREGORY,
Attorney General."

Section 1782 (113 Penal Code 1910) is as follows:

"No senator, representative or delegate, after his election and during his continuance in office, and no head of a department or other officer or clerk in the employ of the government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered or to be rendered, to any person, either by himself or another, in relation to any proceedings, contract, claim, controversy, charge, accusation, arrest, or any other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court-martial, bureau officer, or any civil, military or naval commission whatever" (providing penalty).

Special assistants are a means provided by Congress for meeting emergencies in the service which cannot always be foreseen. And even if foreseen they are of such a character, because they are emergencies, as not to warrant a recurring and individual annual appropriation, such as is made for the regular and permanent staff. They may be employed for one day or indefinitely, in one kind of service or another. Their compensation is wholly a matter for the Attorney General. Their services not only terminate at his pleasure, but with the conclusion or suspension of the particular work for which they are employed.

Because of these characteristics, which place them upon a plane with other persons who are sporadically and ephemerally employed by the heads of departments to perform various kinds of service, commonly called "piece work," these attorneys are held not to come within the various statutes, which, for one reason or another, restrict officers and employes in commercial transactions and private services. And the reasons are quite obvious: On the one hand an impairment of the service by the prohibited acts could not well be predicated of the fleeting and precarious duration of their services. On the other, it would often be difficult to secure the acceptance of such services if Congress were so to restrict them, for the gain would often not compensate for the restraints.

So we find the highest law officer of the government declaring that persons in the exact category of the defendant are immune from these restrictions. And this declaration must apply to all restrictive statutes, for the appropriation does nothing but appropriate; it contains no other language and, therefore, is not susceptible of any distinctions as to duration, compensation, or, what is of more importance, *character of services or of immunities*.

Indeed, the very statute to which their opinions are addressed, 1782, is so broad as to embrace every possible kind of a proceeding before the government, yet these opinions make no distinctions in that behalf, and are unlimited in their scope.

If a special assistant is not in the "employ of the government" (1782) how can it be said that he is "employed in Indian Affairs" (2078)? And it will be remembered that these opinions are necessarily a construction of the Act under which appellee was employed.

Section 1782 does not include the precise inhibition of 2078, for the gravamen are different, the one a trade, the other the "reception of compensation," yet a controlling element in both is employment in the government service, and 1782 necessarily includes 2078, since the very life of the latter depends upon a governmental interest—the guardianship over Indians. And the transaction at bar was one clearly within 1782 also because it was a matter before the Interior Department, requiring by law its approval. And to show that the element of governmental interest is controlling as to both statutes, the attorney or agent in a transaction like that at bar would come within 1782, while *for the same reason* the principle would come within 2078, assuming, of course, that both he and his transaction are within the purview of that section.

No distinction can be claimed as between one kind of restriction and another, because, as has been said, the statute is not susceptible of it. The character of the restrictions in the case cited by Attorney General Gregory varies greatly, and neither his opinion nor those cases make any distinction in that behalf, but are based upon the general ground that services by such persons are not sufficient to make them employes or officers of the government within restrictions based on that element. In 26 Opinions of the Attorney General 247, will be found an exhaustive opinion which holds that employment out of a fund for temporary services, as is the case of employment of attorneys as special counsel by the Attorney General, is an employment temporary in character; that Congress does not create any office for its application, nor recognize the employment as an office, and consequently the Commissioner of Labor was permitted to take such employment contemporaneously with his regular and permanent office without being subject to statutes prohibiting holding two offices over a given salary.

And in that opinion is reviewed the case of *U. S. v. Germaine*, 99 U. S. 508, which was an indictment of a contract surgeon in the Pension Office, who was employed by that office under Section 4777, R. S., authorizing the Commissioner to

"appoint, at his discretion, civil surgeons to make periodical examinations of pensioners and to examine applicants for pensions,"

and appropriating for the employment. The indictment was under Section 12 of the Act of 1825 (4 Stats. 118):

"Every officer of the United States who is guilty of extortion under color of his office, shall be punished by a fine of," etc., etc.

It is true the court's opinion revolves around who is an "officer" of the United States, but that was because of the exclusive use of that word in the statute. The principle of the decision, which holds the surgeon not subject to such a penalty because of the manner in which Congress authorized his employment, is applicable and controlling here, for the statute there is identical in character with the authority to the Attorney General to employ attorneys at law under the title of special assistants, either to himself or to United States Attorneys. Of course, the *rationale* of this decision applies to the word "employed" in 2078. Said the court at p. 511:

"No regular appropriation is made to pay his compensation. * * * He is but an agent of the commissioner, appointed by him, removable by him at his pleasure. * * * He may appoint one or a dozen persons to do the same thing."

The court knows, out of its large experience, that this appropriation for special assistants is designed to meet such exigencies as cases in which the United States Attorney or other officer of the Department is disqualified, or because of temporary pressure of work on those officers, or because the attorney so engaged is peculiarly fitted for the particular work, which is always ephemeral in character. If the court will kindly turn to the case of *U. S. v. Rosenthal*, 121 Fed. 862, it will find a full discussion of the nature, rights and liabilities of employment under this appropriation which will, we think, convince the court of the position taken herein. And a more exhaustive discussion of the same thing in *U. S. v. Va. Car. Chem. Co.*, 163 Fed. 66.

May we now square up the nature of Ewert's employment under the above decisions of the officers under whom he was employed and the decisions of the Supreme Court of the United States with the terms of his employment, and so arrive at the nature and kind thereof? Ewert's letter of appointment (Tr. p. 26) is as follows:

"Sir:

You are hereby appointed a Special Assistant to the Attorney General to assist in the institution and prosecution of suits to set aside deeds made to certain allotments in the Quapaw Indian Agency.

Your compensation will be at the rate of \$. per month, commencing when you enter upon duty, at which time you should execute and forward the necessary oath of office.

Your official residence is fixed at Miami, Oklahoma, and when absent from that place on official business you will be allowed your actual necessary expenses of lodging and subsistence, and your actual traveling expenses, as provided by the Department's orders dated September 1, 1907, a copy of which is herewith enclosed.

This appointment is subject to any change which may me made by this Department."

There is absolutely no proof of Ewert's work in "Indian affairs." There is not a single word of testimony showing that Ewert ever did in fact institute a single suit to set aside the marshal's deeds.

The evidence on this point of Ewert's employment, as found by the court, is as follows:

"All the facts shown in the evidence in relation to Mr. Ewert, the defendant, that are claimed to bring his purchase within the condemnation of this statute may be shortly stated. Mr. Ewert was an attorney at law formerly residing in Minnesota. On October 23, 1908, the Attorney General of the United States appointed him as a Special Assistant to the Attorney General to assist in the institution and prosecution of suits to set aside deeds made to certain allotments in the Quapaw Indian Agency. His official residence was fixed at Miami, Oklahoma. He removed to Oklahoma, going first to Muskogee and remaining there the greater part of November. About the first of December he moved to Miami and appears to have continued to reside there for some months thereafter. *These facts sufficiently show that he was employed in Indian affairs.*" (Italics are ours.)

With the greatest of deference to the opinion of the court, the appellant, Ewert, inquires whether this is evidence of a character sufficiently strong and convincing to warrant the court in finding that the facts recited "sufficiently show that he was employed in Indian affairs." As heretofore stated, the learned court assumed much, presumably from reading the record, wherein the appellees offered some testimony tending to show that Ewert was employed at a later time in the prosecution of other suits. But all of that testimony was ruled out by the trial court. May we ask whether or not this court finds any substantial testimony of a convincing character that Ewert ever did enter upon his employment more than to take the oath of office and go to Oklahoma? If so, where does it appear? If there is doubt about it, the appellee should be given the benefit of that doubt.

Outside of the record, the appellant admits that there were, at the time of his appointment, already pending, eight suits theretofore filed by the United States, having for their purpose the setting aside of certain deeds to certain Indian lands, however, *not Quapaw Indian lands*, made by the United States marshal for Indian Territory under the direction of the Territorial United States Court for Indian Territory, in certain partition proceedings. The suits were instituted by the Government. The Indians were never consulted. The actions were purely suits instituted by the Department of Justice for the purpose of setting aside deeds in which it was claimed that the District Court for the Territory of Oklahoma erred in entertaining the partition suits and in partitioning the land and directing the United States marshal to execute deeds to certain purchasers. The lands themselves that were involved *were not Quapaw Indian lands*, as might be inferred from some of the testimony that was attempted to be introduced by the appellees and ruled out by Judge Campbell. The lands were located in the former reservations of the Shawnee, Ottawa and Seneca Indians. *They were not* located in the reservation of the Quapaw Indians, out of which Charles Bluejacket received his allotment.

The point here desired to be directed to the attention of the court is that under the terms of Ewert's employment, he was not in fact performing any services or engaged in Indian affairs of any kind, in so far as they affected the tribe of Indians known as Quapaw Indians, of which Charles Bluejacket was an allottee.

Therefore, upon what testimony does the court base its findings that "these facts sufficiently show that he was employed in Indian affairs"? Do the facts found by the court and set forth in its opinion show that Ewert was so employed? Did he ever bring a single suit or enter upon his employment, and do any work that may be called Indian affairs?

And again, the sole evidence as to the nature of Ewert's employment is found in his letter of appointment, *supra*. Examining that letter, this court will observe that Ewert was employed, not as an officer, but as an attorney, by the Department of Justice, for the purpose of doing a lawyer's work and only a lawyer's work. The court will observe that his compensation was at the rate \$. per month, and the letter closes with the express statement: "This appointment is subject to any change which may be made by this Department." Squaring this up then, with the authorities hereinbefore cited in the letters of the Attorney General, it cannot be claimed that Ewert was an officer, because, as stated in the opinion of the Honorable Attorney General, *supra*, and by the Supreme Court of the United States, there was in Ewert's employment, "neither duration or continuance of duties, nor duration and continuance of terms." Plainly speaking, Ewert was hired by the month as an attorney; his salary was payable monthly; he was subject to discharge at any moment, and the nature of his employment was subject to change at any moment.

Where then, is there in the testimony a single word tending to show that Ewert, even under the terms of that employment, ever did any work of any kind to bear out the further statements of the court that Ewert's business was only in connection with Indian lands and litigation concerning them? Where is there any testimony that he ever instituted any litigation, or that he ever did any work? The letter of employment expressly stated that his appointment "is subject to any change which may be made by the Department."

This learned court need not be reminded again of the fact that this is a penal statute; that it is highly penal; that it subjected the defendant both to removal from office and to a fine of \$5,000. without any discretion upon the part of a court. How can the court, in construing that kind of a statute under the evidence that it has before it, arrive at the conclusion set forth in the opinion? With the greatest of deference to the opinion of the learned court, we suggest that there is no evidence to warrant any such findings.

This court must presume that Ewert's conduct, even under its own construction of the law, was innocent, rather than guilty; that the nature of his employment was changed and that he did *not* institute the suits, rather than that he did.

There is much looseness of expression found in the record, as shown by the correspondence, but it must be borne in mind, and appellant admits, that later on, *after* this purchase had been made and the deed approved, Ewert's terms of employment were enlarged, and that *he later on*, under that enlargement, instituted certain suits involving the lands of Quapaw Indians. But Judge Campbell rightfully ruled out all such evidence offered by the appellees, as well as that offered by the appellant.

The court erred in not holding that the approval by the secretary, the attorney general and the commissioner were departmental constructions in appellee's favor of all controlling statutes, and in not following that construction.

Certainly the court will not assume that the secretary, the commissioner, and the attorney general, surrounded as they are by a corps of trained lawyers, and secretary Fisher, at least, was of the same training, did not look carefully to the legality of the transaction. We are not contending, as the opposing brief would have the court believe, that these approvals gave validity to an invalid transaction. We say that these approvals were necessarily a departmental construction of all controlling statutes, first by the very department having jurisdiction over the subject matter and then by the highest law officer of the government. Authorities need not be extensively quoted for the learned judge who wrote the opinion in the Court of Appeals is himself authority for the principle. *B'anset v. Cardin et al.*, 261 Fed. 309. And to this we add: *Studebaker v. Perry*, 184 U. S. 258, in case of doubt. And that the ruling should not be overturned without cogent reasons: *U. S. v. Johnston*, 124 U. S. 236; *Heath v. Wallace*, 138 U. S. 573; and that they are entitled to great respect and are ordinarily controlling: *Penoyer v. McConnaughy*, 140 U. S. 1; *Robertson v. Downing*, 127 U. S. 607; *U. S. v. Healy*, 160 U. S. 136.

Both the attorney general and the secretary of the interior declared the transaction to be "legal"; and both officers must have construed this very section, for the secretary declared:

"Mr. Ewert is an employee of your department detailed by the Department of Justice."

(From letter of Frank Pierce, First Assistant Secretary of the Interior to the attorney general under date of June 26, 1909, Rec. 63.)

"In this connection it may be observed that Mr. Ewert is not an employee of the Indian Office and in strictness *was within his legal rights* in bidding on the land in question."

(From letter of Secretary of the Interior, Fisher, to Congressman Davenport, June 8, 1911, Rec. 63.)

"At that time (referring to the date of the interview between Ewert and Wickersham before the approval of the Bluejacket deed), I told Ewert that I saw *no legal reason why he should not purchase the land in question.*"

(From letter of Attorney General Wickersham to R. A. Ballinger, Secretary of the Interior, Dec. 21, 1909, Rec. 64.)

"The case (sale of the Bluejacket land) has been carefully investigated and it appears from the papers in the case that *MR. EWERT ACTED WITHIN THE LAW* and there is no suspicion of fraud in the transaction."

(From letter of Commissioner of Indian Affairs, dated July 19, 1909, Rec. 75.)

"Mr. Ewert, being *an employee of the Department of Justice*, a copy of this letter has been sent the attorney general for his information."

(From letter of Assistant Secretary Pierce to Attorney General, November 19, 1909, Rec. 75.)

"These are the only additional facts learned since the deed was presented for approval last June. *At That I Told Mr. Ewert That I Saw No. Legal Reason Why He Should Not Purchase The Land In Question.* * * * I have no doubt, however, that if I should request it he would re-convey the property to the Government upon receiving back his purchase money, and if you think it desirable to make that request of him I shall do so; although I should prefer not to, in view of the action taken in June and above referred to."

(This is corroborative of the testimony of Ewert offered at the trial, that before the approval of the deed he advised the attorney general and the secretary of the interior that he was the purchaser and was advised by them that they knew of no legal reason why he should not purchase the land.) (From letter of Attorney General Wickersham to R. A. Ballinger, Secretary of the Interior, Dec. 21, 1909, Rec. 75-76.)

"The lands purchased by Paul A. Ewert, Special Assistant Attorney General, have no particular value as mining land and he paid substantially the market value of said lands at the time he purchased the same through superintendent Ira C. Deaver at open market sale under competitive sealed bids; that there was no collusion in the purchase of said lands through said agency, the same having been appraised prior to Mr. Ewert's coming to Oklahoma, and advertised and re-advertised for a period of some nine months prior to the sale."

(From report of Special Agent Leinen, of the Department of the Interior of March 26, 1910, Rec. 78.

"On receiving your letter of the 26th ult. I communicated at once with Mr. Paul A. Ewert who was here, and have received from him an explanation with respect to the purchase of the land described in the deed referred to in your letter which, it seems to me *Frees Him From Any Offense In the Transaction.*"

(From letter of acting Attorney General, Wade Ellis, to Frank Pierce, acting Secretary of the Interior, July 2, 1909, Rec. 80.)

The Court of Appeals erred in not holding that 2078 does not apply to real estate transactions. And it further erred in not holding that in any event it does not now so apply.

It is obvious, aside from the fact that in those early times Indians held no real estate in severalty, and but few, if any, tribes held the fee, that congress was not in those statutes dealing with sales of real estate, with their attendant solemnities and notoriety, but with such trade as passed physically from hand to hand with its inherent lack of protection. Had it been dealing with real estate, it would not require such formal and solemn methods as it afterwards adopted when that exigency arose.

The transaction at bar was approved by the superintendent of the agency and the secretary of the interior, so that in the last analysis it was impossible to have wielded any influence over the vendors. Those officials were the guardians of the Indians, and the result of the opinion is to say that the influence was wielded over them, which, of course, the court does not really intend; however, these safeguards reject the criterion of which the opinion may be susceptible, that the vendee must be in a position to exert influence

which, in any event, we shall show is incorrect. But a more serious question is this: While the word "trade" may normally embrace a real estate transaction, the act of 1834 was enacted at a time when Indian lands could not be sold; in fact, at that time no allotments in severalty had been made. The first act which looked to severalty holdings was the General Allotment Act of 1887. The prohibitive act carried into the revision of 1875 made no provision for approval of a sale or trade with an Indian by the class of persons prescribed; they prohibited it. But with the allotments in severalty there came a policy which is well known to this court: That of permitting the sale of allotments under certain conditions, of which inherited land is one, provided it is done in a certain manner and that the deed is approved by the Secretary of the Interior. This, of course relates only to allotments of land, and the conditions so laid down must be assumed to have been sufficient in the mind of congress to safeguard the Indian, even from influence of Indian office employees. And as the court knows, and as congress presumptively knew, special legislation repeals general legislation so far as it affects the subject matter of the later and special provisions. Hence, although this transaction might have been within the meaning of Section 2078 before the special provisions relating to the sale of allotments, it must be assumed that when Congress provided safeguards and conditions under which the land could be sold, it did not intend to exclude as lawful vendees the persons referred to in Section 2078; otherwise it certainly would have so said. And it is clear that it relied upon the secretary to see that the deed was fair in all respects, because of the plenary power which it gave him, which, because of its plenary character, possessed preventive and therefore even greater prohibitive force than that afforded by Section 2078.

If it be said that the foregoing view means that employees of the Office of Indian Affairs may purchase allotments provided the secretary approves the transaction, we reply: (a) Congress said nothing to the contrary in providing elaborate safeguards for their sale. (b) That because the power of approval of the secretary is plenary and arbitrary, limited in no manner whatever by congress, it is quite plain that that question was one which was left to his discretion. And that this discretion was exercised to its utmost against officers and employees of the Indian Office, see letter of Commissioner Valentine (R. 50):

"The Indian Office has prohibited any of its employees from purchasing Indian lands" (citing an order issued by the office).

What was the necessity for an administrative prohibition of the department, which must be presumed to know the revised statutes covering its affairs, believed 2078 applied to sales of allotments, with its penalty of dismissal? In that very letter Mr. Valentine says:

"Mr. Ewert acted *within the law* and there is no suspicion of fraud."

And the review of legislation by Judge Carland quite plainly shows that 2078 was passed only with goods and supplies in view, for no provision was made for the sale of real estate to Indians by the licensed traders and agents of the Government, nor was it being sold to them "for or on the public account."

The removal of the restrictions by the terms of the statute, and the selling of the land with the approval of the Secretary of the Interior had the effect of taking the transaction out of the law prohibiting trade with "Indians." This was not considered by the Court of Appeals in arriving at its opinion.

The lands in question were sold under the authority of that portion of Section 7 of the act of congress approved May 27, 1902 (32 Stats., 245-275), which reads as follows:

"That the adult heirs of any deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him may sell and convey the lands inherited from such decedent, but in case of minor heirs there interests shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the guardian, but all such conveyances shall be subject to the approval of the secretary of the interior, and when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee."

The contention is now most earnestly made (and this point was not considered by the Court of Appeals) that the effect of the sale under this act was to remove the restrictions of the Indian allottee so that the acceptance of the deed by Ewert was not trade with In-

dians, as contemplated under the provisions of the statute. This court has expressly held that the act of June 7, 1897, Chapter 3, Paragraph 1, (30 Stats. at Large, p. 72), which provides that:

"The allottees of land within the limits of Quapaw Agency, Indian Territory, are hereby authorized to lease their lands for the period of three years for farming or grazing or ten years for mining or business purposes, *was a distinct emancipation of these Indians for the periods and purposes named, and for such periods the Government surrendered all guardianship over the Indians with respect to the specified leases of their lands.*" *U. S. v. Noble, Scott Thompson, et al.*, 197 Fed., 292.

Judge Ralph E. Campbell, of the Eastern District of Oklahoma, in passing upon this same statute in the same case took a similar view, and said, relative to this statute:

"In our opinion, congress intended that within the limitations as to purposes and term, the allottee should exercise the same independent right to lease his property and enjoy the proceeds thereof that the law gives to white citizens, and in lieu of the governmental supervision thus partially withdrawn gives him the status of a citizen and access to a forum where like any other citizen, he could redress his wrongs." *U. S. v. Abrams*, 181 Fed., 851-52.

If the Quapaw Leasing Act of 1897 emancipated the Indian within that period, then surely the Act of May 27, 1902, *supra*, which gave to the heirs of deceased Indians the power to sell and convey their inherited lands if the deeds were approved by the secretary of the interior, had the effect of taking from these Indians as to that transaction, their status as "Indians" within the purview of the statute. In other words, that they were emancipated. They were no longer Indians. Surely, this court does not intend to hold that where the restrictions have been removed under the several acts of congress permitting the removal of restrictions, that even an employee in the office of the commissioner of Indian affairs could not deal with an Indian the same as he could with a white man. He is thereby emancipated as to that land. He is a citizen. He has a right to transact business as he pleases, and there is nothing in any law of governmental policy which could, after any fashion, keep such a person in the status of an Indian, as contemplated under the provisions of Section 2078.

95

The act of May 27, 1907, *supra*, says that they shall have the right to sell their land and that the sale if made and approved by the secretary of the interior "shall convey a full title to the purchaser the same as if a final patent *without restrictions upon alienation* had been issued to the allottee" (in the first instance).

Will this Honorable Court point out wherein Ewert was having trade with Indians as provided under the statute? Congress by the act took from the grantors in that deed the status of Indians, and Ewert had a perfect right to deal with them as to this particular sale of land. We earnestly contend that upon this ground alone, the judgment of the Court of Appeals should be set aside, and the judgment of the trial court sustained.

In holding that the deed to Ewert is void the court fixes an additional penalty not provided in the statute and not intended by the lawmaking power. It therefore was error so to hold.

Section 2078, R. S., provides only two penalties, to-wit: Liability to the penalty of a fine of five thousand dollars, and the penalty of removal from office. It need not be argued to this court that the penalty in itself is extraordinarily severe, and it must be presumed that congress when it provided such a penalty thought that the punishment was severe enough. It surely cannot be gleaned from this section and the accompanying sections of the statute that it was manifest that congress intended to add the further penalty of restoration of the thing purchased from the Indian. In the day of that statute, the trading was principally barter and the passing of personal property of small value from the Indian to the white man or from the white man to the Indian.

In holding as it does that the deed made through the office of the Department of the Interior to Ewert is null and void, this court does attach an additional penalty, and one which counsel contends was not manifested by the Act of Congress itself. In so holding, it contravenes and flies into the very teeth of its own decision in the case of

Dunlap v. Mercer, 156 Fed. 545,

the syllabus in that case was written by Circuit Judge Sanborn, and is as follows:

"The general rule that illegal contracts are void is not of universal application. It is qualified by the exception that

where a contract is not evil in itself and its invalidity is not denounced as a penalty for its violation *by the express terms of the statute*, or by rational implication from the language of the statute which it violates, and that statute prescribes other specific penalties, it is not the province of courts to do so, and they will not thus affix an additional penalty not intended by the law-making power."

Can it be said that the transaction that Ewert had in this case with the Secretary of the Interior of the United States was an evil in itself? Was not the land advertised for public sale seven consecutive times? Did not Ewert bid a thousand dollars more than any other person for the said land? Did not the Indian profit by it? Was not the Indian protected by law and by regulations of the most stringent character? Was not the fact of the purchase of said land by Ewert directed to the attention, *before the approval of the deed*, of the Secretary of the Interior and the Attorney General of the United States, and did they not both say that Ewert was acting within his legal rights, and that he was guilty of no offense? Did Ewert in fact, have any business relations with the Indians? Did he barter or trade with them? Did he persuade them after any fashion to become his grantors? Indeed not. The transaction was fair and honorable and above board, and in every way lawful unless contrary to the statute in question. Ewert was without fault, and should this court now add an additional penalty to a statute which in itself in the first instance, is severe beyond all reasons?

On the other hand, the appellees cannot claim that the deed was unlawful upon the ground that it violates the statute, because of Ewert's employment. The deed was made by the authority of and with the approval of the Secretary of the Interior, an executive official, and assuming that Ewert was acting in violation of law, yet these plaintiffs cannot set that up as a ground for rescission and cancellation of the deed.

Connolly v. Union Sewer Pipe Co., 184 U. S. 540.

The opinion of the Court of Appeals is unsound in that it holds that the conveyance to Ewert can be impugned by the grantor and his heirs. The sovereign alone can object.

In this case an endeavor is being made to set aside a warranty deed made by the heirs of a deceased Indian allottee, who in the petition to the Secretary of the Interior under and pursuant to the rules and regulations agreed that the land should be sold in the man-

ner that the Secretary of the Interior should prescribe. The only right not surrendered is the right to object to the making of the conveyance. They did not object to it. As the court says in its opinion, "it must be presumed that they knew the grantee, Ewert, and knew how he was employed." The Secretary of the Interior knew how he was employed. The Attorney General of the United States knew how he was employed. It is submitted that it is not a sound doctrine, nor is it well founded in the law, that in an instance of this kind an Indian may take the law into his own hands and ten years after the sale has been made bring an action to have the deed set aside—this in the fact of the numerous and repeated decisions of every Secretary of the Interior of the United States in the last ten years, under whose auspices and authority the sale was made, and under the repeated decisions of every Attorney General of the United States holding that the deed was good.

But there is a further reason why the holding of the court is unsound, and that is that in statutes of this kind, the Supreme Court of the United States has repeatedly held, in construing such statutes, that such an action cannot be sustained by a third party. An analogous situation is presented in the case of conveyances of real estate to National Banks not permitted by Section 5137 of the Revised Statutes. A recent and leading case passing upon this section of the National Banking Act is that of

Kerfoot v. Merchants Bank, 218 U. S. 281, the syllabus in which case is as follows:

"In the absence of clear expression of legislative intention to the contrary, a conveyance of real estate to a corporation for a purpose not authorized by its charter is not void, but voidable. The sovereign alone can object; the conveyance cannot be impugned by the grantor, his heirs or third parties.

"Although the conveyance of real estate in this case to a national bank was not one permitted by No. 5137 Rev. Stat., title to the property passed to the grantee for the purposes expressed in the conveyance and that instrument cannot be attacked as void by an heir of the grantor."

Counsel believe that the situations are alike by analogy and submit to this court that the heirs of the Indian allottees, the grantors of Ewert, cannot sustain this action, and that the sovereign alone can bring the suit if there is an action.

We earnestly urge that this is ground for reversal by this court of the decision of the Circuit Court of Appeals.

At the risk of some little repetition, we now desire to submit a supplemental argument to that contained in the preceding pages of this brief and present the matter after the following fashion:

I.

Was Ewert a person "employed in Indian Affairs?"

II.

Was the buying of a tract of land from an individual Indian "any trade with the Indians?"

III.

What was the penalty?

IV.

Was the prohibition removed by the laws on the subject of allotting and selling Indian lands?

V.

Was the action of the Secretary of the Interior in approving the deed final?

I.

Under the first subdivision an inspection of the Revised Statutes of the United States of 1878 is practically conclusive, when the other provisions of the chapter are analyzed. As stated in Black on Interpretation of Laws, paragraph 136, we look to the law and find the provisions clear. Such being the case we do not look further. Section 2078 worded as follows, is the last section of the chapter:

"No person employed in Indian Affairs shall have any interest or concern in any trade with the Indians except for and on account of the United States; and any person offending herein, shall be liable to a penalty of five thousand dollars, and shall be removed from office."

The question most naturally recurring is "*What office?*" Ewert held no *office* and cannot come within the statute. The answer is contained in other sections of the chapter.

First. The board of Indian commissioners, Sections 2039 to 42.

Second. Inspectors; 2043-44.

Third. Superintendents, 2046, 2047, 2048, 2049 and 2050.

Fourth. Agents, 2051.

Fifth. Military officers acting as Indian agents, 2062.

Sixth. Sub-Indian agents, 2065.

Seventh. Interpreters, 2068. These would properly be termed perhaps "employees."

Who were "employed?"

First. The persons provided by Section 2050 all of whom were under the supervision of the superintendent.

Second. Clerks provided by Section 2051.

Third. Interpreters, Section 2068.

Fourth. Instructors, Section 2071.

Under whose authority and jurisdiction were the officers and employees referred to in the chapter?

The President with the Secretary of the Interior makes the appointments direct such as the agents and superintendents.

What duties were prescribed for the "persons employed in Indian Affairs" under the chapter? Nothing similar to the duties of Ewert, who was sent by the Attorney General *to try some law suits*, already instituted and filed. Tested by these rules, a person employed as Ewert was does not come within the prohibition of the statute. Could the Interior Department or any officer engaged in Indian Affairs have removed Ewert? It is clear that a special assistant to the Attorney General was unheard of at the time of the adoption of the revision of 1878 and was never contemplated in the section. The legislation was concerned with what was in the chapter, and the reference was to what preceded. However, if we say that we must look to the other subjects embraced in the title "Indians," it can not be enlarged to such an extent as to embrace Ewert. An inspection of the balance of the sections under this title shows no class of officer that is mentioned or employee that is mentioned was of the kind and capacity of Ewert's employment. In fact all the officers and employees referred to or to which there is a possibility of reference, is the class that had theretofore been mentioned and with which the legislation was concerned. There was some comment in the briefs on the expression "employed in Indian Affairs" being found in the revision while in the original Act it was "Indian Department." Black on Interpretation, paragraph 137 holds that this does not *imply a change in the law*. If we refer to the

original Act found in Volume 4 of the Statutes at Large, page 738, from which the section with a change of phraseology was taken, it becomes apparent that the persons enumerated or rather those employed in the Indian Department were forbidden a department then for the first time organized. Of course it would embrace the teacher as admitted and held in the Douglas case. That a deputy may be appointed under Section 2074 while being an Indian agent, see Opinions of the Attorney General, Vol. XX, page 495.

Section 2067 provides that the president and the Secretary of the Interior shall appoint all the special agents and commissioners, while 2074 provides that no person shall hold two offices at the same time under the title. Interpreters were appointed under Section 2068, while the employees provided for under Section 2071 were appointed by the President as teachers, etc., a report being required to be laid before Congress of what was done under this section annually. No such procedure was had with reference to Ewert. Applying the general rule of construction, viz: That the section refers to what precedes, it certainly does not appear that a special assistant to the attorney general was a person employed in Indian affairs.

II.

Did Ewert have any interest or concern in "any trade with the Indians?"

Evidently the term "trade" is employed in its sense as a business, not an isolated proposition. The definitions of the term as gathered by the lexicographers has already been pointed out. By reference though to the Act of Congress passed the same day as the Act organizing the Indian Department, from which the section was taken, the meaning of the term is made clear. The Act regulating trade and intercourse appears in Volume, 4, Statutes at Large, page 729. Section 2 clearly shows what is meant by *trade*. It is such business as required a license from the Indian agent. What did the license call for? Two years east of the Mississippi, three years west. It called for a bond in the sum of five thousand dollars. It further required the trade to be carried on at certain places designated in the license. Section 4 forbids the residing in the country as a trader, etc., under the penalty and pains of forfeiting license and goods. Section seven concerns receiving of certain articles by "way of barter, trade or pledge." Section 11 is

the one referring to land, and in the event any person should undertake to settle on it or survey it or to mark boundaries he should be removed.

It will be further observed that this act so clearly indicating what is "trade" refers to the other act, in which the prohibition is found about being concerned in "trade" etc. When we refer to it, and especially Section three, it becomes clear that a person acting under orders from the Department of Justice was not one of the persons employed in Indian affairs, as the superintendents of the respective agencies controlled all persons in the respective agencies, who were employed in Indian affairs. Section 13 points in large measure to the class of people indicated in Section 14. It is very evident that the word "trade" used in Section 14 is the trade that was referred to in the other act which could be carried on only at certain places, and under a license, and never referred to an isolated transaction in land, as dealing in land was absolutely impossible. When we examine the provision of the Revised Statutes there is not found therein anything indicating that the word "trade" was used in any other sense than that used in the original act—a thing of permanence and for which a license was issued, and which when the license was issued was lawful. In the Douglas case, the Court of Appeals held that where there were a series of acts in the way of buying from various Indians and selling, it was trade within the meaning of the prohibition, and it was trade in commodities, or personal property. This falls far short of being authority for the position that Ewert by buying the Indian land under the supervision and with the approval of the Secretary of the Interior, was subjecting himself to a fine of five thousand dollars, and removal from office, and as here contended, acquiring no title by the act.

III.

If it be conceded for the purpose of this argument that Ewert was a person employed in Indian Affairs, and it be also conceded that the buying of a piece of land was in contemplation of the lawmakers as "having any interest or concern in any trade with the Indians," what under the act was the consequence and what is the effect of the law concerning the allotting of land to an individual Indian and permitting the individual to sell it without restriction? It must be admitted that if the Indian had the privilege of selling without a special provision saying to whom he

could not sell, or to whom he could sell, he could sell to anybody he wanted to, otherwise there would yet remain partial restrictions and he would not have full power to sell. An examination of the enabling statute and the allotting statute shows conclusively that the only restraint on the sale of the lands belonging to a minor is that the minor shall have nothing to do with it, and it is sold by two officials, who ordinarily are not Indians, viz: The Court Guardian and the Secretary of the Interior, and the Court Guardian makes the deed under the permission of the court, and only in the way prescribed by the Secretary of the Interior. When one examines the regulations he finds that the guardian has very little to do with the matter, it is merely the court and the Secretary of the Interior, with the Secretary of the Interior having the last decision in the matter. Hence, the danger of undue influence is practically *nil* unless we are prepared to go to the length of holding that an appointment to a position under the United States would carry with it such weight that the county judge acting under state authority, and the Secretary of the Interior acting under United States authority, would be largely influenced thereby, an indictment that should not be brought on the evidence in this case, or in any case according to ordinary experience. On the subject generally of the restrictions coming off when permitted to sell, see *Jones v. Meehan*, Book 44, L. Coop. Ed. U. S. Supreme Court Reports. When the act was passed, there was not in it anything whatever limiting the persons who could buy. When the jurisdiction was conferred upon the Secretary of the Interior to approve or disapprove, a discretion was vested in him that under the law could not be controlled by anybody. If the Secretary under the act approves, it is as though there never were any restrictions. The purpose of the law would be absolutely frustrated if the court can set aside the judgment of the Secretary of the Interior on a matter that was brought to his attention, as was the purchase by Ewert prior to the approval of the deed. It is a familiar rule in the constructions of constitutions and statutes, that whenever there is confided to any body or officer, the discretion to approve or disapprove, there the discretion must remain, and no other body can interfere with it when the discretion has been exercised.

IV.

What penalties, if any, did Congress provide for a person employed in Indian Affairs, who had interest or concern in trade with the Indians?

The penalties are set out, viz: A fine of five thousand dollars and removal from "office." Ordinarily, the statutes in cases of this sort provide the penalties, and the courts do not add to them. Where the lawmaking body desires to cause a forfeiture of the fruits of the transactions, it says so. In the present case, before Ewert could be held to lose his land or not get it, it would be necessary for the statute to impose the penalty of rendering the deed void. One of the leading authorities on this proposition is

Dunlop v. Mercer, C. C. A. 156 Fed. 552;

see also

Harris v. Runnels, U. S. Up. Ct. L. Coop. Ed. Bk. 13, 903.

Union National Bank v Mathews, U. S. Up. Ct. L. Coop. Ed. Bk. 25, 189.

Union Gold Mng. Co. v. Rocky Mountain National Bank, U. S. Ct. L. Coop. Ed. Bk. 24, 648.

Hughes v. Snell (Okla.), L. R. N. S. 34, 1136.

State Mutual Fire Ins. Co. v. Brinkly Stave & Heading Co. (Ark.), 31 S. W. 157.

Myers v. McGavock (Nebr.), 58 N. W. 528.

Notes to Hanna v. Kelsey, 33 L. R. A. N. S. 357.

Lane v. Henry (Wash.), 141 Pac. 364.

Ferguson v. Fidelity & Deposit Co., 140 Pac. 700.

In this case an effort is being made to set aside a deed and the entire consideration therefore was received by a United States officer who was entrusted with the receipt of the same. The sale was made under the directions of the United States officer, and no negotiations were had between the Indian and the purchaser. The status of the purchaser was fully known to the Indian agent. It was fully known to the Secretary of the Interior. Both parties to whom the United States had intrusted the management of the sale, in allowing it were equally guilty with Ewert. If the deed to Ewert was voidable, it was on account of the illegality of the sale. It is believed that when the Secretary passed upon the question, it involved the question of "trade with Indians" (if the statute could be construed to apply to a single real estate transaction) and he exercised his judgment on the matter and acted

as a *quasi* judicial officer—it was the end of the matter, as he was entrusted with the regulation of trading with the Indians under the Act of Congress, and he thereby waived his own rules and regulations, as he has a right to do. If on the other hand it was a ministerial matter, he had more to do with promoting the trade by far than the purchaser. If the deed did not confer title, why did Congress so say? The approving officer was the same officer who was entrusted with the administration of the trading with the Indians, and Congress said that when he approved the deed all restrictions on the sale were removed. Therefore as this court has held, the Indians' restrictions were removed, and he was a person *sui juris*, and the trade was not with an Indian.

The question always recurs as to whether Ewert in accepting the deed from an individual Indian was having concern or interest in trade with the "Indians." It must be remembered that the system of law enacted in 1834 was based upon the transactions occurring in the Indian country. The penalty provided as set out in Section 2124 of the Revised Statutes was to be sued for by the United States in an action of debt, one-half to go to the benefit of the informer, the remainder to the United States. The language is

"All penalties which shall accrue under this title shall be sued for and recovered in an action in the nature of an action for debt, in the name of the United States before any court having jurisdiction of the same in any state or territory in which the defendant shall be arrested or found," etc.

If this be true, and the statute mentions the penalty, can the court without violating the rule on the subject of penalties, impose a penalty of forfeiture? That the statute had reference to commodities or rather to something else besides real estate, Section 2125 affords conclusive proof. It provides for the prosecution by the person prosecuting in the manner provided for proceeding against goods, wares and merchandise brought into the United States in violation of the revenue laws. If we extend the statute concerning interest in trade and its penalties to a real estate transaction, do we not have to take the remedy pointed out?

Under Section 2127 the Indian Agent is authorized to sell for the benefit of the Indians under regulations prescribed by the Secretary, any horses or other live stock. In case this is done, and the sale is made to an interpreter employed at the agency, or a

school teacher at the agency, would it be seriously contended that the school teacher would have to deliver the property to the Indian who originally owned them at his suit, or would the matter be redressed under Sections 2124 and 2125, by a suit at the instance of the Government? When the Government sued, could it stand? The answer must be "no" because the agent was empowered to sell without regard to the person buying. But does this statute fit the conditions existing at the time of the land sale? If it does we must look to see how far reaching the statute must go. If Ewert, an attorney hired to bring some suits to set aside court deeds was a person employed in Indian affairs, would not the judge of the court before whom the cases were pending be also employed in Indian affairs? If this statute applies so as to forfeit the land, could an interpreter, or any person who was employed directly or indirectly about the Agency, even as a teamster, put in a bid on Indian land sold at the Agency? Could any person in any way connected with the Indian Department bid on any of the land that is regularly posted periodically and sold in the various Nations each month, though he would have nothing to do with the matter of bringing about the advertisement, nothing to do with the appraisement? Would the advertisement be true that says the property will be sold for cash to the highest bidder, if a large part of those conversant with the advertisement and having nothing to do with it, were precluded from bidding? Could a county judge in Oklahoma, who at any time is called upon to approve deeds to inherited Indian lands coming within the jurisdiction of the County Court, buy a piece of Indian land through the Department, or by private contract? Could a lawyer, in the State of Oklahoma, who while having employment to defend or prosecute suits for Indian lands, or who was engaged in putting a probate sale through of Indian lands, buy from an Indian a piece of land, and if he did, would he forfeit to the United States the sum of five thousand dollars and besides incur the penalty of the deed being held void? Could any officer of the state or nation who is under oath to support the laws of the United States, its constitution and treaties, buy land from an Indian if the proper interpretation of the statute is that which this court has applied to the transaction of Ewert? The answer must be that he could not. The lawyer under the Arkansas law put in force in the Indian Territory by Act of Congress was required under the Chapter of Mansfield's Digest to take an oath to support the Constitution and to faithfully discharge

the duties of the office. He was admitted to practice by a court set up in the Indian Country by the United States for the purpose of carrying on the regulation of Indian trade and intercourse. If the interpretation given to the statute in the present case is correct, could any of these officers legally buy in Oklahoma from an Indian a horse or cow, or anything else? Does the provision apply in Oklahoma, and has it applied in Oklahoma since it was a state or since the United States Courts were put in Indian Territory? We think not, for the simple reason that if it does, Oklahoma is not a state, and its citizens are not treated alike. The holding of the property is regulated by state law. The power was conferred upon the Indian by the laws of the United States to sell the land to whomsoever he could get to buy it, provided the Secretary approved, if the Indian was a competent person, and the holding of it thereafter was regulated by state law. In the event he was not competent, the Secretary of the Interior prescribed the rules and made the regulations. In the present case, apparently everything was done that was required under the Act of May, 1902. It is provided that the conveyance shall be such as though a fee simple title had been given to the Indian. Such being the case, the Indian was as much bound as was a white person, by a conveyance made by the Secretary, and all laws making any distinctions on account of the character of the holder were thereby set aside. In fact, when statehood came and the Constitution was formed, the Enabling Act provided that the Constitution should be Republican in form and make no distinction in the enjoyment of civil or political rights on account of race or color. While primarily intended to protect the Negro, it also protected the Indian, and also hedged him about with the same rights and burdens that the white man had under like circumstances. It is clear that if a white person had transferred the land to Ewert, he could not have gotten it back. The provisions of Section 2078 on the subject of trade with the Indians has evidently been modified by Congress directly, and also a legislative construction of the term "trade" has been given in the Act of Congress of July 31, 1882, Vol: 22, Statutes at Large, page 179. Section 2133 of the Revised Statutes was amended to read as follows:

"Any person other than an Indian of the full blood who shall attempt to reside in the Indian Country, or on any Indian Reservation, as a trader, or to introduce goods or to trade therein, without such license, shall forfeit all mer-

chandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of five hundred dollars."

There was a further provision that this did not apply to the Five Civilized Tribes. If there was any statute that fitted the Ewert case it was this. It was not the case of being concerned or interested in trade with the Indians, it was the case of trading in Ewert's case, and the penalty prescribed for trading when unauthorized, was forfeiture of the merchandise in possession and the penalty. Evidently Congress never thought that the term "trade" meant a real estate transaction. On May 2, 1890, Congress extended over the Indian Territory the Arkansas Laws and provided by that act for the recording of instruments. It later by Act of 1903 put in force laws on the subject of conveyances of real estate. By Section 43 of the Act of May 2, 1890, the Confederated Indians in the Quapaw Agency who might take their allotment in severalty became citizens of the United States, and

"entitled to all the rights, privileges and benefits as such"

there being a proviso that thereby they did not lose any of the rights or privileges they enjoyed as tribal members. By Section 29 of the Act (26 Stat. at large, 182) it is provided:

"and in all cases on contracts entered into by citizens of any tribe or nations with citizens of the United States in good faith and for valuable consideration, and in accordance with the laws of such tribe or nation and such contracts shall be deemed valid and enforced by the courts."

By the Act of April 28, 1904 (33 Stats. at Large, 573), the Arkansas laws were extended to embrace all persons and estates in the Territory, whether Indian or not, and full jurisdiction was conferred upon the courts to settle the estates. It thus appears that the question of contracts with Indians with reference to inherited lands were never characterized by Congress as trade with the Indians, especially in Oklahoma, and that the sections on the subject of trade and license never applied to that kind of a matter. There seems to be a dearth of authority directly upon the propositions involved in this case. However, a very instructive decision can be found rendered by the Court of Appeals upon the subject of the forfeiture of an automobile found carrying whiskey into Indian Territory. The case is

Shawnee National Bank v. United States, 249 Fed. 584.

The point of decision was that an automobile did not come within the forfeiture clause of a wagon, and that the innocent owner should not suffer. In the present case none of the parties thought there was anything wrong with the Ewert purchase, and the very ones to whose discretion the matter was entrusted of approving the deed so thought. Why then, should a penalty of any kind be visited upon Ewert? Why should rescission be allowed without a restoration of the money gotten and put into the hands of the Interior Department officials?

What respect should be shown by the courts to the acts of the department officials?

We think that where Congress has conferred upon the Secretary the power to prescribe the terms, and to approve a deed, that his determination that a person, whose only disability is that he was employed in law suits to set aside court deeds, is a proper one to receive a conveyance is conclusive and the grantor cannot raise the question, neither can the Government and the questions are forever set at rest. We think this power is conferred for several reasons:

First: When Congress provided that the land could be sold with the approval of the Secretary of the Interior, Congress left the matter of the qualification of the purchaser to the decision of the Secretary, and his decision is binding.

Second: The Indian having gotten all the land was worth and the full appraised value, cannot complain of any fraud or incapacity of the grantee because he was not hurt, or of the Secretary's decision.

Third: The grantee was not "employed in Indian Affairs" as declared by Congress.

Fourth: The Secretary was called upon to decide whether the grantee was "employed in Indian Affairs," and his decision that he was not is final.

Fifth: The question of the incapacity of the grantee to take the land by reason of his employment was submitted to the Department of Justice in whose employ the grantee was, and that Department passed on the question. So we have the constructions of two Departments in whom was confided jurisdiction. It seems to us that the questions are fully met and decided by the Supreme Court

of the United States in a long line of decisions. Aside from the general idea that the Judiciary will always give the other Departments credit for presumptively being correct, we have the positive Act of Congress leaving to the Secretary of the Interior the question of allowing the sale or not, and we have the further requirement that the deed when approved shall convey title as though there were no restrictions. If an Indian could not make a conveyance so as to estop himself or his heir, there are restrictions and the Act of Congress does not mean what it says.

We think that the Supreme Court of the United States in the case of

United States, ex rel. West v. Hitchcock, Lawyer's Cooperative Ed. Book 51, p. 719,

has practically settled the questions of the effect of the Department's finding, or rather the findings of the Secretary of the Interior and the Attorney General. It appears from this decision that under the statute referred to, in the estimation of Congress and also of the court, that the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior has the management of *all Indian Affairs*. If this be true, could it be said that Ewert, who was in no way under the Commissioner, was employed in Indian Affairs? See

Johnson v. Townley, Vol. 20, p. 486, Lawyer's Co-op. Ed.
Quinby v. Conlan, Lawyers's Co-op. Ed. Vol. 26, p. 800.
Steel v. Smelting Co., Lawyer's Co-op. Ed. Vol. 27, p. 226.
Louisiana v. McAdoo, Lawyer's Co-op. Ed. Vol. 58, p. 1507.

In the present case, it was a question of fact as to whether Ewert was employed in Indian Affairs, or at the most a mixed question of law and fact. These decisions having been made it was the end of it, even though a court might differ in view. The Indian was not defrauded. He got what was coming to him. He was not in a position to complain of the qualification of the purchaser, and can not now do so. As to what was public policy in dealing with the Indian, the determination in a matter of this sort was confided to the Secretary of the Interior, both by the selling act and by the General Act putting the management of all Indian Affairs in his hands under the direction of the Secretary. It is not believed that anybody could complain except the Government under these decisions, and if the Government could complain it was under obliga-

tion to restore what was paid and received by it as the guardian of the Indian, otherwise, the Act of Disaffirmance within itself would be most unjust. In other words, no equity would exist in such a proceeding.

The Circuit Court of Appeals erred in directing that the decree of the lower court should be reversed as to Amy and Clyde Bluejacket, and Blanche Bear and Carrie Bluejacket as heirs of William Bluejacket.

The Circuit Court of Appeals directed that the decree of the lower court dismissing the bill should be affirmed as to the adult heirs and further decreed as follows:

"We think the case should be reversed and the case remanded with directions to grant the prayers of Amy and Clyde Bluejacket, or Blanche Bear and of Carrie Bluejacket as heirs of William Bluejacket for a cancellation of the deed from these four minor heirs to the defendant, and for an accounting and for indemnification against the apparent lien of the mortgage on their shares of the lands."

Counsel for the defendant Ewert contends that the Circuit Court of Appeals committed error in finding in favor of Amy and Clyde Bluejacket and of Blanche Bear and Carrie Bluejacket. In arriving at this conclusion the Circuit Court of Appeals in its opinion says (265 Fed. 829):

"The deed to the defendant was made by Carrie Bluejacket as guardian of four of the minor heirs—William Blanche, Amy and Clyde Bluejacket. Among the plaintiffs in this bill are Amy Bluejacket and Clyde Bluejacket, as minors, suing by their next friend, and Blanche Bear, formerly Blanche Bluejacket, who is not alleged or shown to be a minor, and Carrie Bluejacket who sues as the heir of William Bluejacket, deceased, but the date of his death is not shown. Whether guardianship of any of these minors has been terminated is not shown. By Section 6583, of the Revised Laws of Oklahoma (1910) it is provided:

'No action for the recovery of any estate, sold by a guardian can be maintained by the ward, or by any person claiming under him, unless it is commenced within three years next after the termination of the guardianship, or when a legal disability to sue exists by reason of minority or otherwise, at the time when the cause of action accrues, within three years next after the removal thereof.'

"The suit of Amy and Clyde Bluejacket obviously is not barred by laches. Their rights to maintain a suit to disaffirm their deed before they have attained their majority is conferred by the Oklahoma statutes. Rev. Laws Okla. (1910) No. 885; *Ryan v. Morrison*, 40 Okla. 49, 135 Pac. 1049.

"The suit of Blanche Bear and of Carrie Bluejacket, as heirs of William Bluejacket, is not shown by the bill nor by the proofs to have been begun too late to obtain the relief demanded. It was incumbent upon the defendant to show that laches existed sufficient to bar their suit, if such fact did not appear from the face of the bill or in their proofs. In order to obtain a cancellation of a deed it is ordinarily necessary that plaintiffs do equity by restoring the consideration received therefor, but this rule does not apply to the disaffirmance of the deed of an infant, if prior to the disaffirmance and during infancy the consideration received has been disposed of, wasted or consumed and cannot be returned. It is not necessary to place the grantee in *statu quo*. (Citing cases.) If there is no evidence that the infant has received the consideration he is not required to offer to return it (citing cases). The presumption is that the purchase money was deposited in banks or with the Indian agent, as required by the rules. There is no evidence that shows the money to have been withdrawn either by the guardian of the minors or by the minors, or that any of it ever came into their possession. An obligation to restore to defendant the consideration for the conveyance of these lands therefore does not appear."

Section 885, of the Revised Laws of Oklahoma, 1910, reads as follows:

"885. Disaffirmance of Minor's Contract. In all cases *other than those specified herein*, the contract of a minor, if made while he is under the age of eighteen, may be disaffirmed by the minor himself, either before his majority or within one year's time afterwards; or in case of his death within that period, by his heirs or personal representatives, and if the contract be made by the minor while he is over the age of eighteen, it may be disaffirmed in like manner upon restoring the consideration to the party from whom it was received or paying its equivalent with interest."

It is respectfully submitted that the Circuit Court of Appeals applied the wrong Statute of Limitations of the State of Oklahoma in arriving at the conclusion that the suits of the minor heirs, Amy and Clyde Bluejacket, and Blanche Bear and Carrie Bluejacket were not barred by laches. The case at bar is not ruled by Section 6583,

of the Revised Laws of Oklahoma, 1910, and Section 885, as hereinbefore quoted. On the contrary, the case at bar is ruled and controlled as to the Statute of Limitations by the second paragraph of Section 4655, of the Revised Laws of Oklahoma, 1910, which section reads as follows:

"4655. Limitation of Real Actions. Second. An action for the recovery of real property sold by executors, administrators or guardians, upon an order or judgment of a court directing such sale, brought by the heirs or devisees of the deceased person, or the ward or his guardian, or any person claiming under any or either of them, by the title acquired after the date of the judgment or order, within five years after the date of the recording of the deed made in pursuance of the sale."

With deference to the opinion of the learned Judges of the Court of Appeals, we dare say that that court was not familiar with the Statutes of the State of Oklahoma, limiting the right of recovery of real property by minors whose lands had been sold by guardians under order of a court.

In support of its conclusion that the suits of Amy and Clyde Bluejacket were not barred by laches, the Circuit Court of Appeals cites the opinion in *Ryan v. Morrison*, 40 Okl. 49, 135 Pac. 1049, as authority and as controlling in this case, but the Honorable Circuit Court of Appeals overlooked the fact that Section 885, of the Revised Laws of Oklahoma is found in Chapter 12, under the head of "Contracts." It overlooked the fact entirely that Section 885, applied to sales and *contracts made by the minor himself, personally.*

This section of the Statute has no application in this law suit because in this law suit the sale of the land was not made directly by the minor heirs. The sale was consummated through the proper channels of the United States and the County Court of Ottawa County, Oklahoma. It was not a deed made by an infant, but to the contrary, was a deed made by the duly appointed guardians of the minor heirs, through proper court procedure, and as required and directed under and pursuant to the provisions of the Act of 1902, permitting the sale of inherited Indian lands, and under and pursuant to the rules and regulations of the Department of the Interior.

The Circuit Court of Appeals, overlooked the fact that the interests of these minors in this land could not be sold except by an

order of the Probate or County Court made upon proper petition therefor. The Act of Congress in that respect in this case were faithfully complied with (Rec. 142-152).

In addition to that the United States in this sale was also acting as the guardian of these minor Indians in the making of the sale, being restricted only by the limitations found in the Act of 1902, *supra*. If this sale was not a sale under an order of a court, then there can be no such sales.

To give Section 885, the construction placed upon it by the Circuit Court of Appeals, would be to so apply that statute that any minor, if his land had been sold through the courts, could *himself* disaffirm the sale and set it aside. That would of course be doing a violence to all court procedure by which a major portion of the Indian lands in the State of Oklahoma have been sold, as well as procedure in the case of sale of land of white persons.

The case of *Ryan v. Morrison*, *supra*, was misapplied by the Honorable Circuit Court of Appeals in *this case*, but it was properly applied in the case under consideration by the Supreme Court of the State of Oklahoma, because in that case the minor himself had sold the land and made a deed representing himself to be of age, when as a matter of fact, he was not of age.

That was an *individual contract* made by the minor, but in this case, the sale of the minors' interest in the lands was made by an order of a court through their guardians, Carrie Bluejacket and L. A. Lafalier. There can be no question about the error committed by the Circuit Court of Appeals in making such an application of this Section of the Oklahoma Statute. The Circuit Court of Appeals has attempted to construe that statute into a broad interpretation that where minor's lands are sold, even through the Probate Courts or through the Secretary of the Interior, that under that Statute those minors could disaffirm the sale before they became of age, or within a year afterwards. It only requires a casual reading of this section of the statute to see the distinctions made between the sale of lands of a minor which that minor afterwards seeks to disaffirm, and a judicial sale made through the County Court, as it is termed in Oklahoma, by a guardian, under the supervision and direction of the Secretary of the Interior of the United States.

The right to maintain the present suit by these minors, and the necessity of restoring the consideration is governed, not by

the authorities cited by the Circuit Court of Appeals, but by Section 1150 of the Revised Laws of Oklahoma, 1910, which reads as follows:

"1150. Estoppel by Receiving Benefits. Any person or corporation having knowingly received and accepted the benefits or any part thereof of any conveyance, mortgage or contract relating to real estate, shall be concluded thereby and estopped to deny the validity of such conveyance, mortgage or contract, or the power or authority to make and execute the same, *except on the ground of fraud*; but this section shall not apply to minors or persons of unsound mind who pay or tender back the amount of such benefit received by themselves."

Avey et al. v. Van Voorhis, 140 Pac. 618, 42 Okl. 232.

In the case of *Tannhill v. Maroney*, decided by the Supreme Court of Oklahoma, October 18, 1921, it was held that where the land of minors was sold by a guardian in regular court procedure and the title fails, such minors before suit are required to tender back the purchase price, with interest.

In the case at bar, the Circuit Court of Appeals announced the rule to be that

"In order to obtain a cancellation of a deed it is ordinarily necessary that plaintiffs do equity by restoring the consideration received therefor, but this rule does not apply to the disaffirmance of the deed of an infant, if prior to the disaffirmance and during infancy the consideration received has been disposed of, wasted or consumed and cannot be returned." It is not necessary to place the grantee in statu quo.

The court further says:

"If there is no evidence that the infant has received the consideration he is not required to offer to return it."

The Circuit Court of Appeals overlooked the fact that there is direct, positive evidence in this case that these minor heirs did receive the consideration. As required by the laws of the State of Oklahoma upon an order directing the sale of the real estate of minor heirs the guardians did report back to the court the exact amount of money received by them from the sale of such lands (Record, 151-2); that each of said minor heirs received the sum of \$555.55; that the same "has been placed to the credit of

each of said minor heirs" in the Cherokee National Bank of Vinita, Oklahoma, subject to the check of their guardian Carrie Bluejacket, as lawful guardian of said minor heirs, when approved by the Indian Agent as representative of the Commissioner of Indian Affairs. There is no evidence to show that they do not now have it in their possession, as all restrictions have expired. It surely is a strange construction of the law for the court to hold that where the money has been paid over to the guardians of the minors whose lands were sold, that the infant had not received the consideration. The guardian stands in the shoes of the infants and the receipt of the consideration by the guardian is a receipt of the consideration by the minors. The foundation of the ground upon which the Court of Appeals holds that these minor heirs need not restore the consideration before bringing suit, crumbles away in the face of the facts appearing in the record itself.

The rules and regulations provide that the moneys received from these inherited Indian lands shall be subject to the check of the guardian and shall be disbursed by the Indian Agent in charge for the use and benefit of said Indians. The record is plain that these infants did receive the consideration named in the deed. This in direct conflict with the statement of the court found in the opinion:

"That if there is no evidence that the infant has received the consideration he is not required to offer to return it."

Opinion of the Supreme Court of Oklahoma directly contrary to the premises under which the Court of Appeals ruled in this case.

The Supreme Court of the State of Oklahoma has only recently, to-wit: Under date of October 18, 1921, handed down an opinion in direct conflict with the laws of the State of Oklahoma as declared by the Circuit Court of Appeals. It further holds that sales of the character herein named in the case at bar are ruled by Section 1150 of the Revised Laws of Oklahoma, 1910. The case referred to is the case of *Maroney, et al. v. Tannehill*, No. 10,233. The opinion was handed down on October 18, 1920, but is not yet published. The concluding paragraph of that opinion is as follows:

"We further hold that the plaintiffs (who were minors) were not estopped by Section 1150, R. L. 1910, from asserting such title and can only be required by virtue of such statute and the rules of equity to *tender back the purchase price received by them from the defendants with interest*, to be off-set by rents and profits for the use of the land. The plaintiffs are also liable to the purchaser for taxes paid and permanent improvements.

"Where the ward recovers from the purchaser in good faith at a guardian sale he is bound to refund the purchase money with interest and all sums paid by the purchaser for taxes and permanent improvements.

Mohr v. Tulip, 44 Wis. 274.

Douglass v. Bennett, 55 Miss. 680.

Cains v. Kennedy, 53 Miss. 103.

In re Dickinson, 11 N. C. 108.

Kendrick v. Wheeler, 857 Tex. 247.

"Estoppel in equity are always favored as their peculiar office is to promote justice." Rohrer on Justice of Sale, Sections 456-471.

"The right to recover the rent or any part of it is denied defendants in error until they have complied with the requirements of this opinion and the cause is reversed and remanded to the District Court of Ottawa County, to be proceeded with as herein indicated."

From the above authorities it must be plain to this court that the Circuit Court of Appeals erred in holding that these minors are not estopped both by the statute of limitations and by their failure to return or offer to return the consideration received by them though their guardians.

This has always been the law in the State of Oklahoma.

See

Avey v. Van Voorhis, 140 Pac. 615.

Hagar v. Wykoff, 39 Pac. 281.

Barnes v. Lynch, 59 Pac. 995.

Garretson v. Latham, 103 Pac. 609.

Sapulpa v. Sapulpa Oil & Gas Co., 97 Pac. 107.

Braddon v. McShea, 107 Pac. 916.

Brusha v. Board of Education, 139 Pac. 298.

Cornerstone Bank v. Rhodes, 83 S. W. 739.

It would further appear that the judgment of the court with respect to the recovery of damages in the form of an accounting was wrong in amount. The defendant Ewert expressly pleads that he has paid the taxes on said land and made permanent

improvements. It is apparent that under these decisions these minor plaintiffs must first, before they can maintain this suit, refund the purchase money with interest, and all sums paid by the defendant Ewert for taxes and permanent improvements.

We again state, with all due deference to the Honorable District Judge Munger, the writer of the opinion in this Bluejacket case, what we have already stated, that he himself was not clear either as to the facts or the law governing. For instance, in the final paragraph of his opinion as found in 265 Fed., p. 830, the court says:

"The suit of Blanche Bear and of Carrie Bluejacket, as heirs of William Bluejacket is not shown by the bill nor by the proof to have been begun too late to obtain the relief demanded."

It is clear from the record that the sole heir of William Bluejacket is Carrie Bluejacket, the mother (See Evidence, Rec. p. 89; Pleadings, Rec. p. 3). The judgment of the court is based upon this erroneous finding of fact, for it reads:

"We think the decree should be reversed and the case remanded with directions to grant the prayers of Amy and Clyde Bluejacket, of Blanche Bear and of Carrie Bluejacket as heirs of William Bluejacket."

In conclusion, we desire further to expressly direct the attention of this court to the reading of Section 1150, R. L. Oklahoma, 1910, hereinbefore quoted, because that is the Section applicable in this case and not the Sections relied upon by the Circuit Court of Appeals and upon which that court bases its judgment. Section 1150 reads in part:

"Any person or corporation *having knowingly received and accepted the benefits or any part thereof of a conveyance, etc., * * ** shall be precluded thereby and estopped to deny the validity of such conveyance."

Referring again to the opinion of the Circuit Court of Appeals 265 Fed. 828, the court there said:

"The defendant therefore claims that he was not engaged in any trade with the Indians but that his dealing was with the United States. This view ignores the fact that the plaintiffs in deciding whether to refuse or accept the defendant's bid and in executing the deed to the defendant as grantee may have signed it because of the confidence in his official position and his relations with the Indians."

In this respect, the opinion of the court may be correct. The evidence discloses that the grantors named in the deed lived in the neighborhood of Miami, where was located for the time being the Government office from which the defendant Ewert transacted business. Ewert may not have been acquainted with them, but they may have been acquainted with Ewert. They must have known who he was, because the evidence discloses the fact that the several suits brought by him from the Miami office created much public comment. Under all the authorities it is presumed and is held, unless it is shown to the contrary, that the grantor knew his grantee and received from him a consideration.

It is respectfully submitted that the Circuit Court of Appeals for the Eighth Circuit committed error in the respects hereinbefore specified, and that its judgment should in such matters be reversed and a decree entered in all things affirming the judgment of the trial court.

Respectfully submitted.

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Supreme Court of the United States

No. 173

**PAUL A. EWERT, APPELLANT,
VS.
CARRIE BLUEJACKET, A WIDOW, ET AL.,
APPELLEES.**

No. 180

**CARRIE BLUEJACKET, A WIDOW, ET AL.,
APPELLANTS,
VS.
PAUL A. EWERT, APPELLEE.**

ON APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT.

**STATEMENT BRIEF AND ARGUMENT OF
APPELLANTS IN NO.**

**ARTHUR C. THOMSON,
COUNSELOR AT LAW,
Attorney for and Appellant.**



INDEX.

	Page
Statement	1
Errors Relied on	16
Argument—	
1. "The transaction whereby appellee, Ewert, through his agent, Smith, obtained the Redeagle deed was a nullity, void, and an unlawful act"	18
2. "The original transaction being void, the lands remained restricted, and no statute of limitation or doctrine of leaches is applicable thereto"	38
3. The court erred in excluding letters.....	53
Conclusion	53

CITATIONS.

Bowling vs. U. S., 191 Fed. 19, 23.....	32
Beck vs. Flournoy Livestock & Real Estate Co., 65 Fed. 36	37
Bell vs. Fitzpatrick, 157 Pac. 334, 53 Okla. 574...	39
Brink vs. Canfield (Okla.).....	40
Brown vs. Anderson, 160 Pac. 724 (Okla.).....	41
Barbee vs. Hood, 228 Fed. 658.....	52
Crocker vs. U. S., 240 U. S. 80, 36 Sup. Ct. Rep. 245	29

INDEX.

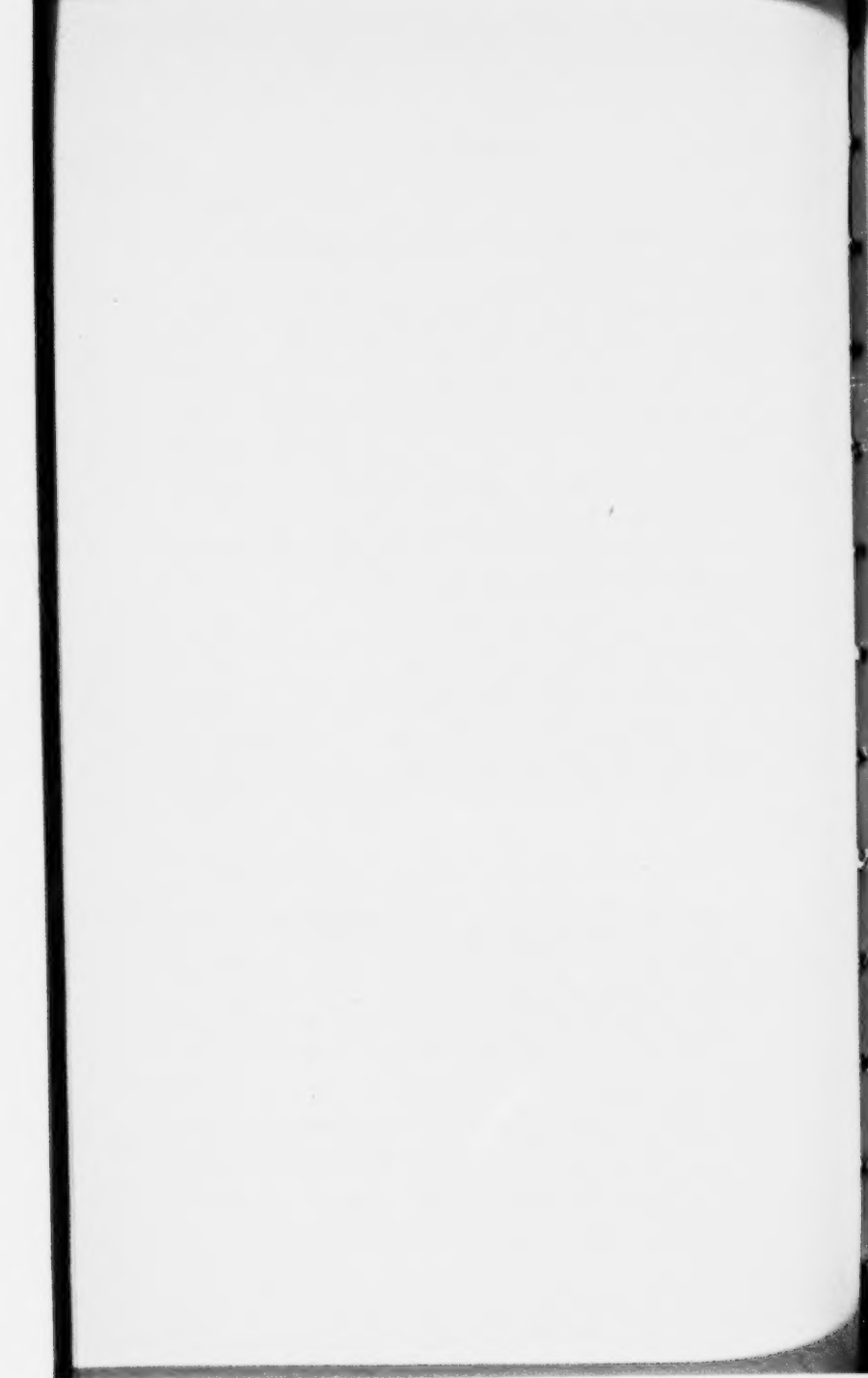
	Page
Cont'l Wall Paper Co. vs. Louis Voight & Sons Co., 212 U. S. 227, 262.....	32
Campbell vs. Dick, 157 Pac. 1062 (Okla.).....	39
Crow vs. Hartridge, 175 Pac. 115 (Okla.).....	41
Felix vs. Patrick, 145 U. S. 317.....	45, 46
General Film Co. vs. Samplimer, 232 Fed. 95, 99..	32
Goodrum vs. Buffalo, 162 Fed. 827.....	44
Galliher vs. Cadwell, 145 U. S. 368, 372, 12 Sup. Ct. 873, 874 (36 L. Ed. 738).....	50
Hanauer vs. Doane, 12 Wall. 342.....	32
Halstead vs. Grinnan, 152 U. S. 412, 417, 14 Sup. Ct. 641, 643 (38 L. Ed. 495).....	50
Jefferson vs. Gallagher, 150 Pac. 1071 (Okla.)...	41
Levy vs. Kansas City, Kan., 168 Fed. 524, 525....	32
Miller vs. Ahrens, 163 Fed. 870, 875.....	32
North Carolina vs. Vanderford, 35 Fed. 282, 283..	32
Norbeck & Nicholson Co. vs. State, 32 S. D. 28, 33, 142 N. W. 847, 850	38
Northern Pacific Ry. Co. vs. Boyd, 228 U. S. 482, 509	49
O'Brien vs. Wheelock, 148 U. S. 450, 493, 22 Sup. Ct. 354, 371 (46 L. Ed. 636).....	51
Prosser vs. Finn, 208 U. S. 67, 74.....	32, 34
Penn Mutual Life Ins. Co. vs. Austin, 168 U. S. 685, 698, 18 Sup. Ct. 223, 228 (42 L. Ed. 626)	50
Patterson et al. vs. Carter et al. (Okla.).....	51
Sage vs. Hampe, 235 U. S. 99.....	25, 30, 32
State vs. Wilson, 73 Kan. 343.....	32
Sheppey vs. Stevens, 185 Fed. 147, 157.....	32

INDEX.

	Page
Sappliner vs. Motion Picture Patent Co., 255 Fed. 242, Second Circuit	35
Sheldon vs. Donohoe, 19 Pac. 901 (Kan.)	41
Schrimpscher vs. Stockton, 183 U. S. 290	47
Trist vs. Child, 21 Wall. 441, 448	32
Telephone & Telegraph Co. vs. Evansville, 127 Fed. 187, 196, 197	37
United States vs. Douglas, 190 Fed. 482	20
United States vs. Hutto, Advance Opinions of Su- preme Court of July 1, 1921, No. 16, page 671 .	30
United States vs. Havenor, 209 Fed. 988	35
United States vs. Aaron, 183 Fed. 352	36
United States vs. Bellm, 182 Fed. 166	37
Vickroy vs. Pratt, 7 Kan. 239, reprint 153	32
Waskey vs. Hammer, 223 U. S. 85, 94	32, 33, 36
Wrigley vs. McCoy, 175 Pac. 259 (Okla.), 261	42

Statutes—

Sec. 2078 Revised Statutes U. S.	19, 21, 22, 31
Sec. 14 Act Providing for "the Organization of the Department of Indian Affairs" (1834)	19
Sec. 271 Compiled Statutes, 1916	19



IN THE
Supreme Court of the United States

No. 173.

PAUL A. EWERT, APPELLANT,
VS.
CARRIE BLUEJACKET, A WIDOW, ET AL.,
APPELLEES.

No. 186.

CARRIE BLUEJACKET, A WIDOW, ET AL.,
APPELLANTS,
VS.
PAUL A. EWERT, APPELLEE.

ON APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR
THE EIGHTH CIRCUIT.

**STATEMENT, BRIEF AND ARGUMENT OF
APPELLANTS IN 186.**

STATEMENT.

The petition (Record, p. 2) charges that the plaintiffs therein were the heirs at law (children) of one Charles Bluejacket, a Quapaw allottee. That said Charles Bluejacket was an allottee, of the Quapaw tribe

of Indians, of the lands involved in this action. That said allottee died in May, 1907, intestate, possession of his said allotted lands, and that of his heirs he left surviving his certain children, minors, named in the petition. That said allottee received a patent from the United States, a copy of which is set forth at Record, p. 9. That the said defendant, on the 8th day of April, 1908, was duly commissioned under the laws of the United States as a special Assistant Attorney-General of the United States, to act as such officer in the Quapaw Agency, and that said defendant as such official was commissioned to enforce and require due observance, by white persons having dealings with the Indians of the Quapaw Agency, of the Acts of Congress enacted for said Quapaw Indians' benefit, and that it was the official duty of such Special Assistant Attorney-General to protect the Quapaw allottees, or their heirs, in the holding and disposition of their said lands and to compel due obedience to and observance of the guardianship of the United States over such Indian allottees with respect to their allotted lands, and that defendant, as such official, kept an office in Miami, in Ottawa County, Oklahoma, for some time prior to April, 1909. That said official caused it to be circulated among the Indians of said Agency that he was the representative of the Government; that he was charged with the duties and obligations of protecting the rights of the Indians under tutelage and guardianship of the Government of the United States. That defendant did assume to act in all deal-

ings concerning the lands of said Indians in said Agency.

That on or prior to the 8th day of April, 1909, the appellants herein (plaintiffs below) petitioned the Indian Agent at Wyandotte, Oklahoma, to sell said inherited lands. That on said last mentioned date said lands were sold to defendant for the sum of five thousand dollars, and that said deed was executed by the appellants, and same afterwards approved by the Secretary of the Interior on July 26th, 1909. That a part of said heirs were minors and had legal guardians appointed in the County Court of Ottawa County, Oklahoma, and that said guardians signed and executed deeds in behalf of said minors to defendant without the supervision of the said County Court or the judge thereof. That there was no attempt on the part of the guardians to have the lands appraised, notice for bidders advertised, or in any other respect to comply with the statutes of the State of Oklahoma respecting the sale of the land of minors. That said deed has never been approved by the County Court of Ottawa County, Oklahoma.

The plaintiffs herein further plead that said lands were, at the time of purchase by defendant, of the reasonable value of ten thousand dollars, and that the said defendant by reason of his employment by the United States as an officer thereof engaged in Indian affairs, and particularly in the Quapaw Agency, where these lands were located, was disqualified and incompetent to purchase, and was prohibited from purchasing said land and dealing with said Indians in any way what-

soever concerning these lands by public policy, and set up what that policy was. That it was the duty of said defendant, as an employee of the United States Government engaged in Indian Affairs, to inform the Secretary of the Interior of the real value of said land, and that it is contrary to public policy and positive statute for the said official to deal with the wards of the Federal Government. That said defendant thereafter entered into possession of said land; that same is rich bottom land with the exception of a small part thereof, and that lead and zinc has been found on said property since said Ewert secured same, and that large sums of money have been taken therefrom, and that the land at the time of the filing of said suit was worth at least fifteen thousand dollars, and that the rental value since said Ewert secured same was at least four hundred dollars per year. That on the 20th day of December, 1910, one Lillias Barrowman advanced by way of loan to said Paul A. Ewert the sum of thirty-five hundred dollars upon said property, and said property was mortgaged to secure said indebtedness.

The defendant below (appellee herein) filed his answer September 30, 1916, which appears at Record, pp. 15 to 45, inclusive. The answer is very lengthy, full of surplus matter, and the substance we present as follows:

The defendant admits his residence and citizenship in Missouri, and states that he is not informed as to the residence of the plaintiffs, and is not informed as to the death of one of the heirs of William Bluejacket, and

denies that the suit involves construction of Acts of Congress; admits the allotment of lands to Charles Bluejacket, and admits that the heirs of Bluejacket were those signing a deed to him, and admits that the heirs were in possession of the lands involved until the 8th day of April, 1909, and denies the allegation that he was on the 8th day of April, and for a long time prior and subsequent thereto, by commission duly issued, a special Assistant Attorney-General of the United States to act as special Assistant Attorney-General in and for the Quapaw Agency of the State of Oklahoma, and admits that as such special Assistant Attorney-General of the United States he kept an office in the City of Miami, Oklahoma, from about the first day of December, 1908, until the 11th day of August, 1910, but denies that it was his duty to enforce and require due observance by all white persons having dealings with the Indians of said Agency of the Acts of Congress enacted for their benefit, and denies in detail the allegations of the plaintiffs as to his official duty to protect the said allottees, their heirs and their lands; denies that he circulated reports concerning his activity in requiring white persons to remove leases and deeds from Indian lands, and denies that he assumed the position of attorney for all the Indians in the Quapaw Agency, in matters relating to their allotted lands, and denies that he assumed to act or did act in any other capacity than as authorized by the letter of appointment set out in his answer.

Defendant avers that in July, 1908, these plaintiffs and other heirs petitioned the Secretary of the Interior to sell the lands involved in this action, in conformity with the rules and regulations promulgated by the Secretary of the Interior, and said lands were duly advertised, and that on the 8th day of April, 1909, he, the said defendant, was the successful bidder for said lands at a price of five thousand dollars, and that he bought same pursuant to the regulations as aforesaid. Charges in detail the proceedings for sale, and that on the 8th day of April, 1909, and on the 13th day of April, 1909, all of said heirs joined in said deed, to him, by their guardians. That said deed was duly approved by the Secretary of the Interior on the 26th day of July, 1909, and that said deed was afterwards recorded in the office of the register of deeds of Ottawa County. Denies that the lands were worth ten thousand dollars at the time of said purchase, and denies that he ever discouraged any bidder for said land, and denies that he, by reason of his employment by the United States as an officer thereof, engaged in Indian Affairs, and particularly in the Quapaw Agency of Oklahoma, was incompetent to purchase said land or was incompetent and disqualified to deal with said Indians in any way whatsoever, and denies that it was his duty to advise the Indian Commissioner or Secretary of the Interior of the value of this property, if in excess of that which he paid for it, and denies that he entered into possession of said lands from the date that he purchased same, and avers that he did not enter into possession until

during the crop year of 1910; denies that the lands are all in cultivation, and denies that it is rich bottom land, except ten or fifteen acres, and denies its value for lead and zinc mining purposes, and further denies that said land is located in the mineralized belt, and denies that the rental value is four hundred dollars per year, but avers that ninety acres of said land is bottom land, but not rich bottom land, and that less than one hundred acres of the lands involved in this action are tillable and can be cultivated.

Defendant admits at the time of the execution of the deed Carrie Bluejacket was the duly and lawfully appointed guardian of said minors except Cora LaFallier, now Cora Arnett, and Louis Pascal, and admits that L. A. LaFallier was the duly appointed guardian of the last two named minors, and admits that the deed was signed by said guardians for and in behalf of said minors, and denies the allegation that the guardians were not authorized by the court to sell the interests of said minors, but admits *that the said lands were not appraised under the law of the State of Oklahoma*, but avers that they were appraised as required by the laws of the United States, under which said lands were sold, and denies that the deed is void in so far as it attempts to convey the interests of said minors, and avers that the County Court of Ottawa County ordered that said guardians sell said lands through the Secretary of the Interior, and that same were sold under the rules and regulations promulgated by the Secretary of the Interior.

The defendant (paragraph 8, Record p. 25) avers that he was in no wise, manner or fashion connected with or in the employ of the Department of the Interior; that he was employed by the attorney general in only one respect, that is, to institute and prosecute certain suits to set aside certain deeds commonly known as marshal's deeds, which had theretofore been made by the United States Marshal under the direction of the Federal Court, unlawfully conveying the interests of heirs of deceased allottees to certain lands in said agency, and that he was not employed otherwise, and refers to his letter of commission signed by the Honorable Charles J. Bonaparte, Attorney General of the United States. That during all the times mentioned in plaintiffs' petition, his employment was confined to the purpose stated and to no other, and that no other litigation of any kind was instituted by him during that period.

That he had paid taxes to the amount of five hundred dollars, and in paragraphs 11, 12 and 13 pleads laches and the statute of limitations against these Quappaw Indians' right to maintain this action at this time, and in his prayer prays the court that if it shall find against him that he be allowed certain sums of money, representing expenditures in improvements thereon.

The above is a fair statement of the material allegations of the defendant's answer, eliminating therefrom the scandalous and irrelevant matter and the exhibits attached thereto, which consist of his deed and

the rules and regulations of the Secretary of the Interior respecting sale of Indian lands.

On March 15, 1917, the cause came on for trial, the evidence was duly taken, and argument was heard, and the court took same under advisement and gave time for filing briefs. On June 4, 1917, the plaintiffs below (appellants herein) filed with the court a motion to set aside the submission of the cause and permit the plaintiffs to file amended petition, which was offered. That said amended petition charged that the deed executed by these plaintiffs to the defendant was, when submitted to the Honorable Indian Commissioner and the Honorable Secretary of the Interior for their approval, the subject of much discussion as to the right and propriety of the defendant to purchase said lands. That thereafter the Secretary of the Interior did approve said deed on the representation and statement of this defendant and the Honorable Attorney General that the defendant herein had purchased no other lands in the Quapaw Agency and would cease dealing in said lands, and that said approval was obtained and given upon this deed upon the condition that said defendant had not purchased other land or lands within said Agency. That this approval of the said Secretary of the Interior was obtained by false representations to said Secretary of the Interior and by withholding information from said Secretary of the Interior and by deceiving said official, as well as the Indian Commissioner, and in concealing from them the fact that the said defendant, Paul A.

Ewert, had, prior to the time of the final approval of the deed involved herein, purchased from George Redeagle, in the name of Franklin M. Smith, as a dummy and for the sole use and benefit of this defendant, one hundred acres of land which was restricted land and under supervision of the Secretary of the Interior, and that the Redeagle deed made to Franklin M. Smith, who was a dummy acting for Paul A. Ewert, was approved by the Secretary of the Interior on the 30th day of April, 1909, and the fact that Paul A. Ewert was the real purchaser of the Redeagle land was concealed from said Secretary of the Interior.

The motion to re-open and set aside the submission sets out a number of exhibits, being photographic copies certified from the Indian Office, showing the correspondence concerning these deeds, clearly indicating that the Department of the Interior was misled as to Paul A. Ewert's activity in purchasing lands from Indians of the Quapaw Agency, the admission by Ewert (Record, p. 52) that such transaction was indiscreet on his part, the affidavit of Franklin M. Smith (Record, p. 49) as swearing that there was no "suppression of facts as to any feature of the transaction," although Ewert in his answer in the case of *Redeagle et al. v. himself*, admits that he was the purchaser and that Smith was his agent and that Smith allowed his name to be used in behalf of Ewert in such transaction.

Attached to this motion is his other correspondence between the Attorney General of the United States, the Indian Commissioner, Secretary of the Interior, and Mr.

Paul A. Ewert, showing the controversy over the approval of the Bluejacket deed, the propriety of his dealing in these Indian lands, and letters of Paul A. Ewert (Record, pp. 56, 57, 58, 59) urging the Secretary of the Interior to approve a deed made to him on the Redeagle land in 1913, wherein he states again that the Redeagle land was sold to Franklin M. Smith. These letters were dated in 1913, showing as late as that date that he was representing to the Department that Smith was the purchaser of the Redeagle land whose deed was approved by the Secretary of the Interior in April, 1909, while the Bluejacket deed was pending before the Department for approval. At the time this motion was submitted the plaintiffs offered a large number of certified photographic copies of letters and the record from the Department of the Interior showing the correspondence, and these were all presented to the court upon the hearing of said motion, and the court in passing upon said motion examined and considered these exhibits in overruling the motion to set aside this submission and permit the filing of the amended petition.

On March 4, 1918, the court overruled said motion to reopen said cause and permit plaintiff to amend petition, allowing the plaintiffs exception thereto, and thereupon and on the same date (Record, p. 88) decreed that the plaintiffs take nothing by their suit, and that the issues be found in favor of the defendant. Thereafter the appeal was perfected to this court.

The evidence offered in this cause was not lengthy, and all of it is found in the record (Record, pp. 89-153).

After trial of the case and the allowance of an appeal, Judge Campbell resigned and Judge Frank A. Youmans was duly assigned to the Eastern District of the State of Oklahoma. The record was submitted to Judge Campbell on the 13th day of November, 1918, and he certified to the correctness thereof (Record, p. 153) and thereafter Judge Youmans, acting as judge of said court, certified also to the correctness of said record and ordered that the full testimony be reported to this court.

In the trial of this case there were but three serious questions of fact: First, the rental value of the land; second, the value of the land at the time of the purchase by Paul A. Ewert; and third, the scope of the employment of Paul A. Ewert as special assistant attorney general at the time of his said purchase.

The testimony of A. W. Abrams (Record, pp. 90-106) and W. M. Smith (Record, pp. 106-116) was offered, and clearly establishes the rental value as well as the value of the fee at the time of purchase. Through the witness Smith certain letters written by Paul A. Ewert as special assistant attorney general, to W. M. Smith and other persons, were offered for the purpose of showing that prior and subsequent to the purchase of this land by the defendant, Paul A. Ewert, he was representing the Government and Indian Department in examining into the legality of mining and farm leases on Indians' lands, the lands of allottees and their heirs in the Quapaw Agency. These letters were excluded by the court (Record, pp. 112-113), the letters being Exhibits from 3 to 9, inclusive; and at Record, pp. 135-141 these

letters disclose that as early as January, 1909 (Record, p. 135), the defendant, as special assistant attorney general, was pressing the witness, W. M. Smith, to cancel certain leases on Quapaw lands, and this letter discloses that Ewert was acting under the instructions of the attorney general. The letter (Record, p. 138) discloses a threat made by Mr. Ewert in his official capacity, to sue the witness if certain leases were not canceled on Indian lands, and the letter (Record, p. 141) written as early as January 15, 1909, discloses the same character of threat to the same witness by Mr. Paul A. Ewert in his official capacity. This evidence was excluded by the court and was offered for the purpose of showing the assumed authority of Mr. Paul A. Ewert.

Other evidence was offered by the plaintiffs (Record, pp. 120, 121, 123) of witnesses S. A. Roberts and M. C. Faulkenberry, editors and publishers of two newspapers in Miami, Oklahoma, to establish the fact that at this time and during the transaction complained of in this suit Ewert was furnishing to these newspapers typewritten matter for publication advertising the fact that he had cleared the title of Indian lands of many thousands of acres of illegal leases. The newspaper copy was duly offered, and the court excluded same on the same theory, that the plaintiffs were confined to the authority of Ewert expressed in the letter of commission. These newspaper articles are not a part of this record for the reason that same were mislaid or lost by the reporter and could not be obtained.

We believe the court erred in excluding the letters mentioned, as well as the newspaper articles, as Ewert should not be permitted to say (which he did) that prior to the time that he had this transaction with the Blue-jacket heirs his sole authority was that of setting aside what is termed marshal deeds, as these letters, admitted by Ewert to be authentic, disclose that he was examining the titles of the Indian owners with a view of cancelling all illegal leases, and this is confirmed by the letters set up in the motion to resubmit, taken from the files of the Department of the Interior. These letters, excluded by the court, as well as the letter written by the commissioner (Record, p. 50) and the Assistant Secretary of the Interior (Record, p. 51) show that he was duly authorized to examine the legality of titles of Quapaw lands, and that in pursuance to such authority the defendant was attempting to secure cancellation of leases by threats of proceedings by the Government. The court further erred, in our judgment, in denying the motion of the plaintiffs to re-open the case and file amended petition, charging that Ewert secured the approval of the deed involved in this action by misrepresentation and concealment of material facts from the Secretary of the Interior concerning such approval. The court further erred, in our judgment, in his finding upon the issues in the case that the defendant was entitled to the judgment of the court that the plaintiffs take nothing by their suit.

The appeal was perfected to the Circuit Court of Appeals, and on March 1, 1920, the court filed its written opinion therein, being found in 265 Fed. at

page 823. The court found that Ewert was within the condemnation of Section 2078 Revised Statutes of the United States, and was disqualified from purchasing the Quapaw lands, ordered the deed canceled as to the minor plaintiffs, and found that the adult plaintiffs were entitled to no relief because of their laches or delay in bringing suit. Petition for rehearing was filed by Mr. Ewert as well as the adult plaintiffs, and both were denied by the court. Ewert took an appeal from the judgment of the court in favor of the minor plaintiffs, and the adult plaintiffs took cross appeal to the judgment of the court excluding them from relief on the ground of laches. The cause is now pending before this court. The two main questions for this court to decide are: (1) Was Paul A. Ewert, while Assistant Attorney General of the United States, engaged in Indian Affairs within the purview of said Section 2078; and (2) Assuming that he was and that he was disqualified from purchasing Quapaw lands, was not his deed void and illegal? If so, the restrictions were never removed, the land was restricted at time of bringing the suit, and no statute of limitation can apply and a court of equity should not impute laches to restricted Indians.

ERRORS ASSIGNED.

I.

The court erred in holding that the appellants herein are barred of their right of action on account of delay in bringing suit, because, the deed being void, the land remained restricted, and no doctrine of laches is imputable to these Indians, and further, because the delay has not occasioned any injury to Mr. Ewert.

II.

The court erred in holding that the adult plaintiffs were barred of their right of action on account of laches because the effect of such a holding is to divest the restricted Indian of his title and to vest same in Paul A. Ewert, in direct opposition to and violation of a positive statute of the United States and the public policy announced therein.

III.

The court erred in denying said adult plaintiffs relief in holding that under the laws of the State of Oklahoma the statute of limitation had run, and this was because appellant, Paul A. Ewert, had cited to said court the case of *Campbell v. Dick*, 157 Pac. 1062, as authority for the position taken by the court, when in fact the Supreme Court of

the State of Oklahoma, in *Campbell v. Dick* on rehearing in 176 Pac. p. 520, expressly held that the statute of limitation was fifteen years.

IV.

The court erred in refusing to reopen the case before judgment was announced, and permit testimony and exhibits showing a fraud upon the Secretary of the Interior in securing the approval of this deed in question.

V.

The court erred in refusing to admit testimony of letters written by the defendant, Paul A. Ewert, prior to the time of his purchase of the lands in question, showing the assumed authority that he had, and clearly establishing the allegations of the petition of the plaintiffs that he was engaged generally in the business of examining and quieting titles of Quapaw Indians at the time of his purchase of these lands. These letters are found in the Record, pages 135 to 141.

BRIEF AND ARGUMENT.

I.

The transaction, whereby appellee Ewert obtained the deed was a nullity, void and an unlawful act.

Appellants contend that appellee was "engaged in Indian Affairs" when this purchase was made and that he came clearly within the condemnation and prohibition of Revised Statutes 2078 hereinbefore quoted and was therefore disqualified from purchasing from or contracting with this Indian.

Appellee will contend that he was not "engaged in Indian Affairs" although an Assistant Attorney General of the United States and prosecuting suits for and on behalf of the Indians and even if he were within said statute he had permission of the Attorney General to make such purchases.

It is abundantly clear from the record that at the time of this purchase the appellee was engaged in examining Indian titles in the Quapaw Agency and forcing the release of all leases or claims which in his judgment were invalid and preparing under the direction of the Attorney General's suits to clear the Indian titles from such clouds. He was the member of the Department of Justice detailed to the Quapaw Agency, Oklahoma, engaged in carrying out the policies of the Indian Office. This is established by Ewert's own letters (R. 135-141) and

the letter of Honorable Frank Pierce, assistant Secretary of the Interior (R. 51).

Was he then "employed in Indian Affairs," within the meaning of said Section 2078? This statute, when enacted in 1834, was Section 14 of the Act providing for "The Organization of the Department of Indian Affairs," and the first two lines of this section then read:

"And be it further enacted that no person employed in the *Indian Department* shall have any interest or concern in any trade with the Indians."

The change, substituting the phrase, "Indian Affairs" for the phrase "the Indian Department" was made after the Act of June 22, 1870, the 17th Section of which is now Section 189, Revised Statutes, and Section 271, Compiled Statutes, 1916, which reads:

"No head of a department shall employ attorneys or counsel at the expense of the United States; but when in need of counsel or advice, shall call upon the Department of Justice, the officers of which shall attend to the same."

The restrictive phrase, "the Department of Indian Affairs," being substituted by the more general statement, "in Indian Affairs," evinces a purpose to broaden the scope and meaning of this section so as to reach persons other than those employed in the Indian Department; and probably the reason for the changing of the phrase, "Indian Department" to "Indian Affairs," was to meet just the situation which we have here. At all events, the effect in making the change, substituting the words "Indian Affairs" for "Indian Department" was

unquestionably to broaden the scope of the section as first enacted.

The act prohibits any person, whether an employe of the Department or not, from having any concern in trade with the Indians, if he is employed in Indian Affairs, and meets two conditions—one, that he is under contract of employment in Indian Affairs; and the other, that he is working in Indian Affairs in any capacity whatever.

When Ewert received his commission, which constituted his contract of hiring, he was at once, and because of same brought within the purview of the statute.

United States v. Douglas.

In the case of *United States v. Douglas*, 190 Fed. 482, the defendant was a member of the Crow Creek band of Indians, and resided in the Indian Agency in South Dakota. She was sued by the United States for the penalty expressed in Section 2078, based on the fact that she had purchased cattle from Indians on the reservation, which had been furnished the Indians by the Government.

The Act of July 4, 1884, 23 Stat. 94, declares that where Indians are in possession or control of cattle, or their increase, which have been purchased by the Government, such cattle shall not be sold to any person not a *member of the tribe to which the owner of the cattle belongs*, or to any citizen of the United States, whether inter-married with the Indians or not, except with the consent in writing, of the agent of the tribe to which the owner or purchase of the cattle belongs.

The defendant belonged to the same tribe as the Indians who had sold her their cattle, and without anything further being shown, and for that reason, she had the right to buy the cattle, and the Indians had the right to sell to her.

The statute is in form a prohibition against the *Indian selling* his certain particular cattle, but the court held the prohibition was against the buyer as well. The case was made to turn on the disqualification of the defendant to make the purchase, and that disqualification was based on the fact that, "she was for many years employed by the Government as a female industrial teacher, and while so employed" purchased the cattle. It was *her* relation to the Government, and not because the cattle bought were I. D. cattle, which brought her within the purview of Section 2078.

The trial court found that she was not liable for the penalty, under Section 2078, Revised Statutes, and the Government appealed. Of course, the first proposition was whether the making of the purchase itself constituted having "any interest or concern in any trade with the Indians."

The discussion opens with this statement:

"Did the defendant, in making the purchase in question, have any interest or concern in any trade with the Indians, within the meaning of the section of the Revised Statutes quoted?"

The court discussed at length the meaning of the word "trade," then the history of the Act of June 30, 1834, 4 Stat. 738, which is the statute there and here in-

volved. Then follows a discussion of the various statutes, prohibiting and regulating dealings with the Indians, tracing the same from the Act of July 23, 1790, 1 Stat. 137, and emphasizes the course of legislation as prohibiting the *agents and servants of the Government* from purchasing or having dealings with the Indians, and using the word "agent" in its broadest sense; and finally saying, at p. 489:

"The sections of the statutes are all clear and consistent, if these various sections prohibiting government servants from buying certain articles refer to purchases whether upon Government or individual account; and, so construed, none of the prior statutes cited have any real bearing on the meaning of the word 'trade' as finally used in Section 2078 of the Revised Statutes."

The court then points out that the policies expressed in the statutes have been to prevent the persons in the employ of the Government from dealing with the Indians, and at the top of p. 490, points out the change in the statute, substituting the words "Indian Affairs," for the phrase "in the Indian Department," and saying that the defendant, as a member of the same tribe as the Indian who sold her his cattle, had the right to make the purchase, were it not for the fact that she was also an employe of the Government, and finally put the decision squarely on the proposition that the defendant as a school teacher, was in the employ of the United States and stated:

"As an Indian of the same tribe she could probably have lawfully made these purchases, were

it not for the fact that by reason of her *also being a Government employe in Indian Affairs* she was prohibited from doing so."

And again:

"There was nothing in this act to indicate a purpose on the part of Congress to authorize the Government's own agents, placed in a controlling position, to use that position, to overreach its wards."

And, again it is stated:

"The Government in its capacity as *quasi* guardian ought not to allow its *agents* to be tempted to overreach its wards. A schoolmaster placed by the government among a people under tutelage might well be expected to wield a large influence, and it is revolting that this influence should be used to subserve self-interest in barter with those who are the subject of wardship. We sustain a trust relation with the Indians imposed by the laws of the land, if not by an even higher law; and when Congress, recognizing this, forbade its agents to trade with the Indians, no strained effort should be made to construe trade in some unusual way, so as to include only sales to the Indians, and not purchases from them," etc.

The court there is dealing with the word "trade," as used in Section 2078. The Government, in the exercise of its policy toward the Indian, had employed this woman to teach school. She was held to be within the purview of this section of the statutes, and subject to this penalty.

In the Douglas case, the defendant was obligated to teach children. This was her sole contractual obligation. Under her employment she owed no duty to the

adult parent and her employment in no sense obligated her concerning the property of the Indians. Her offense was a statutory one, and did not involve the breach of any contractual or fiduciary obligation. Yet this court held her act was condemned by the statute.

In the case at bar, Ewert was employed by the Government *to protect and preserve the property* of the Indians. He dealt with the Indian for his land, the property he was commissioned to protect and preserve. He was not only, by reason of the fact that he was a Government employe engaged in the affairs of Indians, prohibited, but also because he dealt for the specific thing which he was sworn to protect—*Ewert bought the very subject-matter of his trust from the word of the Government.*

The Government, in the exercise of its policy toward the Indian, desired to bring suits and prosecute them for invasion of the Indians' rights in Ottawa County, Oklahoma; and, it was performing that function by commissioning the defendant to go into Ottawa County, and prosecute these suits. He was employed "in Indian Affairs" just as much as was this school teacher. He was an agent of the Government, and the means by which it was performing one of its governmental functions toward the Indians, under the policy established under the Constitution and the Acts of Congress. And that the lawyer's opportunity to gain great influence over the Indians was very much greater than that of a school teacher, is apparent to all. Moreover, this defendant not only did obtain undue influence over the Indians,

but this court cannot read the letters in this record on the motion to reopen and permit the offered amendment to be made, and resist the conclusion that he obtained undue influence over the department having immediate charge of these Indians.

His plea in his answer, that he was only employed to bring suits to set aside marshals' deeds (which are not mentioned in his contract of employment), and his plea that he was not an employe of the Indian Department, only emphasize his reckless disregard of the obligations of his trust, and have no tendency to exclude his acts from the operations of this statute.

Ewert, by reason of being employed by the Attorney-General's office, to bring suits affecting the Indian lands in Ottawa County, Oklahoma, which was under the direction and personal supervision of the Interior Department, of necessity would be working with the Indian Department in bringing and prosecuting these suits, and was hence brought in such relation with the Interior Department as to enable him to wield an influence over that department in the matter of approving Indian deeds, and the matter would not have to be carried to the extent that it was carried in the case of *Sage v. Hampe*, 235 U. S. 99, to render his contract void with this Indian.

In that case, Sage claimed to own certain lands in Oklahoma, and entered into a written contract to sell and convey the lands to Hampe. The land in fact was Indian lands, held under trust patents, and Sage could not make title. Hampe sued Sage for breach of contract in the District Court of Kansas, and had judgment, and

the Supreme Court of Kansas held that he could recover on the grounds that one may make contracts to sell and convey lands of which he is not the owner, and may become liable for damages for breach of such contracts. *Hampe v. Sage*, 87 Kan. 526, 125 Pac. 53, 55. This is the law, of course.

The Supreme Court of the United States, conceding this proposition to be the law, reversed the judgment and held the contract was contrary to the policy of the Government toward these Indians, in that their allotments should not be sold except *in instances when it is to the best interests of the Indian* that it shall be done; and held that a contract between two white men, the enforcement of which might tend to bring to *bear improper influences upon the secretary*, or to induce attempts to mislead him as to *what welfare of the Indians required*, was void, because contrary to the governmental policy. It is stated, page 105:

"And more broadly it long has been recognized that contracts that obviously and directly *tend* in a marked degree to bring about results *that the law seeks to prevent*, cannot be made the ground of a successful suit."

And again:

"It appears to us that this is a contract of that class. It called for an act that could not be done at the time and it tended to lead the defendant to induce the *Indian owner* to attempt what the law, for his own good, forbade. Such contracts if upheld might be made by parties nearly connected with the Indian and strongly tend, by indirection,

to induce him to deprive himself of rights that the law seeks to protect. It is true that later statutes in force when the contract was made allowed a conveyance with the approval of the Secretary of the Interior. Act of August 15, 1894, c. 290; 28 Stat. 286, 295. Act of May 21, 1900, c. 598, Sec. 7; 31 Stat. 221, 247. The Kansas court laid these statutes on one side, *and in our view also they do not affect the case.*"

And again:

"The purpose of the law is still to protect the Indian interest and a contract that tends to bring to bear *improper influence upon the Secretary of the Interior*, and to induce attempts to mislead him as to what the welfare of the Indian requires are, as contrary to the policy of the law, as others that have been condemned by the courts."

And again, p. 106:

"The case at first sight seems like those in which a state decides to enforce or not to enforce a domestic contract notwithstanding or because of its tendency to cause a breach of the law of some other state. *Graves v. Johnson*, 179 Massachusetts, 53, 156 Massachusetts, 211. *But the policy involved here is the policy of the United States. It is not a matter that the states can regard or disregard at their will.* There can be no question that the United States can make its prohibitions binding upon others than Indians to the extent necessary effectively to carry its policy out, and therefore, as on the grounds that we have indicated the contract contravenes the policy of the law, there is no reason why the law should not be read, if necessary, as broad enough to embrace it in terms."

This, and its companion transaction, shown in this record with Redeagle, did actually not only tempt the defendant to *try* to use improper influence, but did cause him to use improper influence. See his letter to the Assistant Secretary of the Interior, on p. 52 and afterwards, as late as April 5, 1913, his improper attempt to influence the secretary, still brings about an improper appeal.

In *Munson v. Railway Co.*, 103 N. Y. 58, a case extensively cited and followed by many courts, the court considered public policy, which forbade a trustee from being concerned in any trade with his beneficiaries, and answering the same character of contention, at page 74, stated :

"It does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case. It prevents frauds by making them, as far as may be, impossible, knowing that real motives often elude the most searching inquiry, and it leaves neither to judge or jury the right to determine upon a consideration of its advantages or disadvantages, whether a contract made under such circumstances shall stand or fall. It can make no difference in the application of the rule in this case that Munson's associates were not themselves disabled from contracting with the corporation, or that Munson was only one of ten directors who voted in favor of the contract."

And does not the public policy of the government, which the court expressed by the terms "*quasi guardian*"

and "wards of the nation," and such like language, extend to and prohibit the agents of the government from dealing with Indians, upon the same principle that the rule of public policy which forbids a trustee from purchasing his ward's property, prohibits the agent of such trustee from so purchasing? This fact is in harmony with the view expressed in *United States v. Douglas*, *supra*.

In *Crocker v. United States*, 240 U. S. 80, 36 Supreme Court Reporter, 245, the court declared a contract void, because of its tendency to induce improper influences over the heads of departments and cited Sage-Hampe and other cases following this statement:

"Considerations as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the government. No other consideration can lawfully enter into the transaction, so far as the government is concerned. Such is the rule of public policy; and whatever tends to introduce other elements into the transaction is against public policy. That agreements like the one under consideration have this tendency is manifest. They tend to introduce personal solicitation and personal influence as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds. * * * Agreements for compensation contingent upon success, suggest the use of sinister and corrupt means of the accomplishment of the end desired. *The law meets the suggestion of evil and strikes down the contract from its inception.* There is no real difference in principle between agreements to procure favors from

legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments. The introduction of improper elements to control the action of both is the direct and inevitable result of all such arrangements.' Further recognition of this rule is found in (other cases omitted, and) *Sage v. Hampe*, 235 U. S. 99."

Consideration of the welfare of the Indian and the effects of the sale of his allotted lands, to be approved by the Secretary of the Interior. No other consideration can lawfully enter into the transaction, is the rule of public policy of the United States. That other considerations did enter into this transaction is made plain by the statement of Ewert in his letters to the department, and his personal appeals to the officers and agents of the Department of the Interior.

United States v. Hutto.

This case is reported in Advance Opinions of Supreme Court of July 1, 1921, No. 16 at page 671. In this case this court recognizes the breadth and scope of Section 2078 and extends its provisions far beyond what we claim here. In the Hutto case this court held that the official Indian farmer was by Section 2078 prohibited from dealing with the Indians concerning non-restricted property such as automobiles etc., and said:

"It manifestly was and is designed to insure integrity of conduct on the part of all persons employed in Indian affairs, and an impartial attitude towards the Indians, by excluding from

persons so employed all motives of personal gain, so that the duty of the United States as trustee for these dependent peoples, recognized wards of the Government, might be performed with a single regard for their interests appropriate to the fiduciary relation. The purpose was to protect the Indians from their own improvidence; relieve them from temptations due to possible cupidity on the part of persons coming into contact with them as representatives of the United States; and thus maintain the honor and credit of the United States, rather than to subserve its pecuniary interest."

And further considered the violation of the prohibition contained in Section 2078 as "an offense against the United States," saying:

"And we deem it clear that a conspiracy to commit any offense which, by Act of Congress, is prohibited in the interests of the public policy of the United States, although not of itself made punishable by criminal prosecution, but only by suit for penalty, is a conspiracy to commit an 'offense against the United States' within the meaning of Section 37, Criminal Code, and, provided there be the necessary overt act or acts, is punishable under the terms of that section."

It would seem that his last expression of this court is conclusive. Here the Indian farmer was engaged in a business of dealing with other Indians for property non-restricted and not within his care as an employee and this court condemns the act as an offense against the United States as violative of its public policy. While in the case at bar defendant contends that he should be permitted to retain property secured by him

although his trust as an official included the care for and protection of this particular property. *United States v. Hutto, supra*, says it is an offense against the United States.

The general rule of law is that an act done in contravention of a statutory prohibition is void, and not merely voidable, and hence confers no right on the wrongdoer; and the fact that a statute prescribes a penalty for the doing of a prohibited act does not confine the scope of the statute to the prohibition nor make the prohibited act valid as against parties other than the sovereign.

Hanauer v. Doane, 12 Wall, 343.

Cont'l Wall Paper Co. v. Louis Voight & Sons Co., 212 U. S. 227, 262.

Prosser v. Finn, 208 U. S. 67, 74.

Waskey v. Hammer, 223 U. S. 85, 94.

State v. Wilson, 73 Kan. 343.

Miller v. Ahrens, 163 Fed. 870, 875.

Bowling v. United States, 191 Fed. 19, 23.

General Film Co. v. Samplimer, 232 Fed. 95, 99.

Sheppey v. Stevens, 185 Fed. 147, 157.

Trist v. Child, 21 Wall. 441, 448.

Levy v. Kansas City, Kan., 168 Fed. 524, 525.

North Carolina v. Vanderford, 35 Fed. 282, 283.

Sage v. Hampe, 235 U. S. 99.

Vickroy v. Pratt, 7 Kan. 239, reprint 153.

The purchase of this land by Ewart at the time he was a special assistant to the attorney-general of the United States is utterly void, not only as between him-

self and the United States, but also as between himself and the Indian, or any person, who had acquired title from the Indian, even after the transaction.

The effect of the statute Section 2078 is not limited to subjecting the defendant to the penalty of five thousand dollars therein prescribed by the Act, but the deed which he claimed is utterly void.

In the last paragraph of the opinion of the case of *Waskey v. Hammer*, 223 U. S. 85, 94, it is stated:

"The general rule of law is that an act done in violation of a statutory prohibition is void and confers no right upon the wrongdoer, but this rule is subject to the qualification that when, upon a survey of the statute, its subject matter and the mischief sought to be prevented, it appears that the Legislature intended otherwise, effect must be given to that intention. *Miller v. Ammon*, 145 U. S. 421, 426; *Burck v. Taylor*, 152 U. S. 634, 649; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 548. Here we think the general rule applies. The acts described in Sec. 452 are expressly prohibited under penalty of dismissal. There is in its language nothing indicating that its scope is to be confined to the exaction of that penalty, *Prosser v. Finn*, *supra*, or that acts done in violation of it are to be valid against all but the Government. Nor is there anything in its subject-matter or the mischief sought to be prevented which militates against the application of the general rule. On the contrary, it is reasonably inferable, from the language of the section and the situation with which it deals, that it is intended that violations of it shall be attended by the ordinary consequences of unlawful acts. We therefore are of the opinion that the readjusted location was void." See *Miller v. Ammon*, 145 U. S. 421.

Appellee will with great particularity argue that he had induced the Interior Department to approve his deeds. He also testified on the witness stand that the attorney general justified his conduct; and he contends that the Interior Department, by its agents, had acquitted him of any wrong, and for that reason, plaintiff could not recover.

A similar contention was made in *Prosser v. Finn*, 208 U. S. 67, where an agent of the Land Department made an entry while he was such agent. Being in possession, he ceased to be an agent, and then made another entry. One of his contentions was that the Land Commissioner held that he was a special agent, and that the statutes prohibiting agents and employees of the Land Office from making entries would not apply to him. The contention was expressly overruled, and the court said (p. 74):

"In the eyes of the law his case is not advanced by the fact that he acted in conformity with the opinion of the Commissioner of the General Land Office, who states, in a letter, that Sec. 452, Rev. Stat., did not apply to special agents. That view, so far from being approved, was reversed, upon the formal hearing, by the Secretary of the Interior. Besides, an erroneous interpretation of the statute by the commissioner would not change the statute or confer any legal right upon Prosser in opposition to the express prohibition against his purchasing or becoming interested in the purchasing of public lands while he was an employee in the General Land Office. The law, as we now recognize it to be, was the law when the plaintiff entered the lands in question, and, being

at the time an employee in the land office, he could not acquire an interest in the lands that would prevent the Government, by its proper officer or department, from concealing his entry and treating the lands as public lands which could be patented to others. It may be well to add that the plaintiff's continuing in possession after he ceased to be special agent was not equivalent to a new entry."

In *Sapliner v. Motion Picture Patent Co.*, 255 Fed. 242, Second Circuit, p. 251, it is stated:

"The question whether an agreement is void on the ground that it is contrary to public policy is to be determined by its general tendency. If that is opposed to the interest of the public the agreement is void, even though in the particular case the intent of the parties may have been good and no injury to the public may have resulted."

And again on page 252:

"It matters not that any particular contract is free from taint of actual fraud, oppression or corruption. The law looks to the general tendency of such contracts."

And again the court said:

"The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country."

In *United States v. Havenor*, 209 Fed. 988, a contention, exactly analogous to this defendant's contention, was made; and in that case the defendant was operating under a special appointment as here, and as to such contention, the court said, p. 990:

"True, deputy mineral surveyors exercise no control over, or discretion in, the matter of the disposition of the Pocatello townsite, but Section 452 does not operate merely to disqualify employees of the land office from purchasing lands to which their duties directly relate. In the wisdom of Congress, it was provided that no employe of the Land Office, wherever he might be employed, or whatever might be his duties, should directly or indirectly become the purchaser of or interested in the purchase of, any public land, wherever the same might be situated. A register or receiver of a United States land office in Idaho has nothing to do with the disposition of public land in California, and yet, under the general prohibition of the section, he is disqualified from purchasing public lands in California. So here, while a deputy mineral surveyor may have nothing to do with the disposition of Pocatello townsite lots, he falls within the sweeping prohibition of the section, and is thereby disqualified from becoming a purchaser. It is possible that the purpose of the law might be accomplished by a more restricted provision, but that is a consideration addressed to the Legislature rather than the judicial department of the Government."

Waskey v. Hammer, 223 U. S. 85, 170 Fed. 31, 35.

"We have thus seen that the deeds assailed in this case were unauthorized and void. They were executed in violation of valid limitations imposed by Congress upon the division and alienation of the lands in question."

United States v. Aaron, 183 Fed. 352.

"Thus the law stood until the Act of 1902, *supra*, providing for the sale of inherited allotments by the heirs, subject to the approval of the Secretary of the Interior. The heirs in this case could

have availed themselves of this statute, and by proper probate court proceedings in case of minors, and securing the secretary's approval, have legally disposed of the land. If the act did not authorize the sale of the land as attempted in this case, then the fact that it was pursuant to a decree or order of court, lends no validity to the transaction. *Goodrum v. Buffalo*, 162 Fed. 817, 89 C. C. A. 525."

United States v. Bell, 182 Fed. 166.

"For these reasons we have no hesitation in holding that the leases secured by the real estate company were executed in open violation of the laws of the United States, and are therefore utterly null and void."

Beck v. Flournoy Livestock & Real Estate Co.,
65 Fed. 36.

In *Telephone & Telegraph Co. v. Evansville*, 127 Fed. 187, 196 & 197, it is stated:

"Complainant's counsel confuse the words 'void' and 'voidable.' Such confusion has frequently occurred in statutes and decisions of courts, but in the cases cited in the original opinion herein the Supreme Court of the United States used the word 'void' in its strict and proper sense; and in the case of *Central Transportation Co.*, *supra*, in the paragraph quoted in the original opinion, the court held the contract in that case to be 'not voidable only, but wholly void, and of no legal effect.' 'Contracts to do acts that are illegal, criminal or contrary to public policy * * * are absolutely void.'"

"The law cannot recognize as valid any undertaking to do what fundamental doctrine or legal rule directly forbids. Nor can it give effect to any agreement the making whereof was an act violating law."

Gibbs v. Balliner Gas Co., 130 U. S. 396, 410.

In *Norbeck & Nicholson Co. v. State*, 32 S. D. 28, 33, 142 N. W. 847, 850, it is stated:

"But in no one of these cases, nor indeed in any case which has come under our observation, have the courts entertained any contract, or any rights growing out of a contract, where either the consideration was based, or the contract was against the express prohibition of the law. This, then, is the undoubted rule that when a contract is expressly prohibited by law, no court of justice will entertain an action upon it, or upon any asserted rights growing out of it. And the reason is apparent; for to permit this would be for the law to aid in its own undoing."

II.

The original transaction being void, the lands remained restricted, and no statute of limitation or doctrine of laches is applicable thereto.

The Circuit Court of Appeals in its opinion filed in *Bluejacket v. Ewert*, 265 Fed. 823, held that Ewert was disqualified from purchasing and that his deed was void. But further held that the adult grantors were barred in equity because of their laches or delay in bringing suit.

The court in its filed opinion says:

"The plaintiff executed this deed in April, 1909, and this suit to cancel the deed was begun in June, 1916. The time within which the adult grantors could have brought such a suit under the statute of limitations applicable to suits or cases by the laws of Oklahoma had then expired."

We respectfully urge that the court is in error in making this statement. This no doubt results from a misapprehension of the case of *Campbell v. Dick*, decided by the Supreme Court of Oklahoma. We contend that the statute of limitation (if applicable at all) is fifteen years. Counsel for appellee Ewert cited the case of *Campbell v. Dick*, 157 Pac. 1062 (Okla.) as authority for his contention that the limitation was two years. He failed to call to the attention of the court that *Campbell v. Dick*, on rehearing (176 Pac. 520) was affirmed, holding that the limitation period in that case was fifteen years and not two years, as the court had originally held in 157 Pac. 1062.

The deed being a nullity, the adult grantors should have the same relief unless by their conduct they are precluded. If precluded by their conduct (delay or laches) then Ewert has obtained title to their lands, although restricted, not in accordance with law, but in open defiance of the law, and in a court of equity.

The courts now uniformly hold that title to Indian restricted lands can be obtained in no way or manner except as is authorized by Act of Congress, and that "no scheme, however ingenious," can be used to divest the Indian of his title except in such method provided by law.

The Supreme Court of Oklahoma has had similar questions before it, and the question is now settled in Oklahoma that there is but one way to obtain title to Indian restricted lands, and that is by *lawful conveyance* in the method fixed by Congress. In *Bell v. Fitzpatrick*,

157 Pac. 334, 53 Okla. 574, the defendant claimed title by judgment entered in his favor in the District Court, although the land could only be sold through the Probate Court. The court said:

"The effect which counsel seek to give the purported orders of dismissal is to divest the title of plaintiff in and to the lands in question and reinvest it in defendant. While they say that it amounts to a judgment quieting title, this is another way of saying that the void deed is given validity and effectiveness in this indirect way, when such deed is an absolute nullity. Defendant had no title which could be quieted, and the District Court had no jurisdiction to effect a transfer of the plaintiff's title to her restricted lands to defendant in such manner. Neither can defendant by any device or scheme acquire that title in violation of the public policy of the United States, as expressed in the various Acts of Congress affecting matters of this character."

In *Brink v. Canfield et al.*, decided by the Supreme Court of Oklahoma on June 19, 1919, and now pending on rehearing, the court say:

"The inquiry is readily answered by the decisions of this court in *Jefferson v. Winkler*, 26 Okla. 653, 110 Pac. 755; *Bell v. Fitzpatrick*, Okla. . . . , 157 Pac. 334; and by other cases, and by the Circuit Court of Appeals in *Goodrum v. Buffalo*, 162 Fed. 817, 89 C. C. A. 525; and *Bowling v. United States*, 191 Fed. 19, 111 C. C. A. 561, the latter case being affirmed on appeal by the Supreme Court of the United States in 233 U. S. 528, 58 L. Ed. 1080. At the time Jack's suit was instituted, there was but one way in which he could alienate his title to the lands which he had inherited, and that was by a deed of conveyance, approved by the court

having jurisdiction of the settlement of the estate of the deceased allottee (35 Stat. at L. 312, c. 199). While the restrictions had been removed from the lands in the sense that Jack had the power of alienation, it could only be consummated and made effectual when approved as pointed out in the foregoing Act of Congress. Without the making of a deed and its approval, no judgment could be rendered, regardless of the character of the suit or the issues joined, whereby Jack's title could be divested, he being a full-blood Creek Indian, and the lands being lands allotted to his kinsman, through whom, upon the death of succeeding heirs, his title was derived. Nor could the judgment be given effect in a subsequent legal proceeding, *either as an estoppel* or as constituting a former adjudication of his title. In other words, insofar as the title to such lands was concerned, the judgment was a nullity, because of a want of power in the court to make it. Any other view would mean the circumvention of the statute prescribing the manner in which such lands may be alienated, *and make nugatory the Acts of Congress prescribing the manner and terms of conveyances of allotted lands inherited by full-blood Indians.*"

To like effect see:

Brown v. Anderson, 160 Pac. 724 (Okla.).

Jefferson v. Gallagher, 150 Pac. 1071 (Okla.).

Crow v. Hartridge, 175 Pac. 115 (Okla.).

In *Sheldon v. Donohoe*, 19 Pac. 901 (Kan.), the court said:

Donohoe has no other title nor any better right to convey to Sheldon than he had when the void deed was made. Sheldon was incapable of taking title to the land then, and has been ever since that time. By the paramount Federal law he was pro-

hibited from taking the title, and therefore he cannot indirectly *build up one by adverse possession, estoppel, or any statute of limitations.*"

This Sheldon case was cited with approval in *Goodrum v. Buffalo*, 162 Fed. 827, and the court added:

"It should be understood, once for all, that no scheme or device, however ingenious or plausible, concocted by any person, can avail to divest the Indians of the title to their allotted lands within the period of limitation prescribed by Congress."

In *Wrigley v. McCoy*, 175 Pac. 259 (Okla.), at page 261, the court say:

"In each of the treaties made with Indian tribes, the United States has reversed the right of control over the lands granted, and it has been the universal holding of the courts that such lands can be alienated only in the manner prescribed by the laws of the United States, and in accordance with treaty stipulations with the Indian tribes."

Again, page 262:

"It cannot be contended logically that the mere occupation and use of Indian lands which are non-alienable, there being no conveyance to the occupant or his grantors, would give the occupant the right to invoke the statute of limitation. Can it then be said that such occupation and use would be strengthened by a deed which the grantors, under the law, were unable to make and which was without any force or effect? Can the United States thus be deprived of its guardianship and interest in the lands? We do not think that alienation can be accomplished by indirection, when such cannot be done directly.

In *Gibson v. Chouteau*, 13 Wall. (80 U. S.) 92, 20 L. Ed. 534, the Supreme Court of the United States says:

'The occupation of lands derived from the United States, before the issue of their patent, for the period prescribed by the statutes of limitation of a state for the commencement of actions for the recovery of real property, is not a bar to an action of ejectment for the possession of such lands, founded upon the legal title subsequently conveyed by the patent.'

Quoting from the syllabus of *McGannon v. Straightlege*, 32 Kan. 524, 4 Pac. 1042:

'Under the treaty between the United States and the confederated tribes of Kaskaskias, Peoria, Piankeshaws and Weas, of May 30, 1854 (10 U. S. Stat. at Large, 1082), an Indian was allotted a certain piece of land, and before the patent was issued he executed a deed therefor to the defendant's grantor. Such deed has never been approved by the Secretary of the Interior. The defendant and his grantor have been in quiet and peaceable possession of the land ever since, and for more than 15 years prior to the commencement of this action. After the patent was issued to said Indian, and after his death, and on June 23, 1882, his sole surviving heir executed a deed of conveyance for the land to the plaintiff; and on October 10, 1882, such deed was approved by the Secretary of the Interior, and on April 25, 1883, the plaintiff commenced this action against the defendant to recover the land. Held, that neither this action nor the plaintiff's title to the land is barred by any statute of limitation.'

The court in the body of the last-quoted opinion, used the following language:

'The title being an Indian title—or, in other words—the title being vested in the United States and an Indian—no statute of limitations could operate against such title.' "

"This court, in *Miller v. Fryer*, 35 Okla. 145, 128 Pac. 713, says:

'It is well settled that there can be no adverse possession against the Federal Government which can form the basis of title by estoppel or under the statutes of limitation; and it has been held that the same rule applies where the lands involved are lands that have been allotted to Indians, with restrictions upon the alienation of title thereto by the Indians, so long as such restrictions upon alienation exist.' "

The opinion in the Bluejacket Case is, in our humble judgment, inconsistent with the same court's opinion in *Goodrum v. Buffalo*, 162 Fed. 817, wherein the court, at page 826, said:

"If the Indian could create *no estoppel* against himself or herself by deed of conveyance, how could he or she create an estoppel by consenting to a judgment as the basis of an estoppel effectual to alienate the land, in direct contravention of the Acts of Congress? The allottees of these lands, during the probationary period of twenty-five years, were under as much disability to alienate them by contract or deed or voluntary submission to a court as if they had been under the disability of coverture or minority. The disability of the minor to do these things is imposed by the common law. The disability of these Indians is imposed by statute. It must therefore logically and necessarily follow that the record of a judgment of a court disclosing on their face that the disqualified Indian was entering into an agreement for submission of the question of his rights to dispose of these lands was in no wise different from such a proceeding participated in by a minor infant."

This expression of the court in the *Goodrum* case is made concerning a Quapaw Indian, and the opinion ends with this forceful statement:

"It should be understood, once for all, that no scheme or device, however ingenious or plausible, concocted by any person, can avail to divest the Indians of their allotted lands within the period of limitation prescribed by Congress."

The case of *Felix v. Patrick*, 145 U. S. 317, cited in the opinion, is not, as we view it, supportive of, or even analogous to, the case at bar; because (1) there was no restriction against alienation of the land located; the Indian had a right to issue the power of attorney for location and give deed for the land; (2) that F located the land for her as her representative and an implied trust resulted, which did not prevent an adverse holding; (3) that the case is bottomed on fraud; (4) the time was twenty-eight years, and in the meantime the land had passed into the hands of innocent purchasers, had been platted into town lots, streets and alleys opened, becoming immensely valuable, and the loss would fall on innocent persons not connected with the fraud. *At all times the Indian could have disposed of said land without any restriction or supervision of the Federal Government.*

The case at bar is different, as is shown by the holdings of the Oklahoma Supreme Court. The grantors were not free to dispose of this land as a white person, and it could be taken from them in only one way—the method prescribed by Congress. No innocent purchaser is involved here. Ewert himself is charged with knowledge of the law, and this record abounds in testimony of his activity in securing the approval of this deed by his influence with high administrative officials of the government.

The court, in *Felix v. Patrick*, page 326, said:

"The device of a blank power of attorney and quit claim deed was doubtless resorted to for the purpose of evading the provision of the Act of Congress that no transfer or conveyance of the scrip issued under such act should be valid. This rendered it necessary that the scrip should be located in the name and for the benefit of the person to whom it was issued, but from the moment the scrip was located and the title to the land vested in Sophia Felix, *it became subject to her disposition precisely as any other land would be.* In order, therefore, for the purchaser of this scrip from Sophia Felix to make the same available, *it became necessary to secure a power of attorney or a deed of the land,* and as the scrip had not then been located, and the person who should locate it was unknown, the name of the grantee and the description of the land must necessarily be left blank."

Again, page 329:

"The most important question in this case, however, the question upon which its result must ultimately depend, is that of laches. While, upon the facts stated, Patrick took these lands as trustee for Sophia Felix, he did not take them under an express trust to hold them for her benefit (in which case lapse of time would be immaterial), but under an implied or constructive trust—a trust created by operation of law, and arising from the illegal practices resorted to *in obtaining the power of attorney and deed.*"

Again, page 333:

"The real question is, whether equity demands that a party who, 28 years ago, was unlawfully deprived of a certificate of muniment of title of the

value of \$150, shall now be put in the possession of property admitted to be worth over a million. The disproportion is so great that the conscience is startled, and the inquiry is at once suggested, whether it can be possible that the defendant has been guilty of fraud so gross as to involve consequences so disastrous. In a court of equity at least, the punishment should not be disproportionate to the offense, and the very magnitude of the consequences in this case demands of us that we should consider carefully the nature of the wrong done by the defendant in acquiring the title to these lands. *He is not charged in the bill with having been a party to the means employed in obtaining the scrip from Sophia Felix, or with being in collusion with the unknown person who procured it from her.*"

Also, *Schrimpscher v. Stockton*, 183 U. S. 290, cited in the opinion, is not analogous; because (1) although the deed of Stockton, defendant, was void, the statute of limitations had more than run since the disability of the Indian and the inalienability of the land had been removed by the treaty of 1868; (2) the suit was brought more than 20 years after the land *was alienable*.

A few quotations from the opinion makes this case clearly distinguishable.

Referring to treaty of 1868 (page 295):

"This article makes the following distinct provisions: I. It removes all restrictions upon the sales of land patented to incompetent Wyandottes, which should thereafter be made. * * *

"But although the treaty of 1855 and the patent to Rodgers had expressly provided that there should be no alienation by the grantee or his heirs, the treaty of 1868, which took effect after his death,

removed all restrictions upon alienations which should thereafter be made, either by the incompetent grantee, Rodgers, or his heirs, who thereafter held an alienable title, and were bound to assert such title within the time specified by the statute of limitations, *although no title could be gained by adverse possession so long as the land continued to be inalienable by Rodgers and his heirs. McGannon v. Straightlege*, 32 Kan. 524; *Sheldon v. Donohue*, 40 Kan. 346."

Again, page 296:

"Their *disability* terminated with the ratification of the treaty of 1868. The heirs *might then* have executed a valid deed of the land, and possessing, as they did, an unincumbered title in fee simple, they were chargeable with the same diligence in beginning an action for their recovery as other persons having title to lands; in other words, they were bound to assert their claims within the period limited by law. This they did not do under any view of the statute (whether the limitation be three or fifteen years), since it began to run at the date of the treaty, 1868, and the action was not brought until 1894, a period of over twenty years.

Again, page 297:

"As Article XV *removed all restrictions upon the sale of lands* by incompetents, if the heirs of Carey Rodgers took the position that the article did not apply to them, they assumed the burden of proving that fact."

Here it is admitted Ewert knew he was dealing with a restricted Indian; the Indian is restricted today, and no provision has been made as in the treaty of 1868, in the Stockton case.

Again, page 298:

"There was no evidence in this case, except from the patent, that the grantees even knew that Rodgers was an Indian, as was the case in *Taylor v. Brown*, 5 Dakota, 344, much less that he belonged to the incompetent class, and they apparently received the deed, as many people do, without a careful examination of the grantor's title."

This again distinguishes the case. The vendée did not know his grantor was an Indian or in any way incapacitated from selling. The case at bar discloses that Ewert knew with whom he was dealing, the limitations of the Indian's powers, and much influence was necessary to obtain the approval of the deed. This use of influence alone should condemn the appellee's case. The Schrimpscher-Stockton case is bottomed on the delay of action by the Indians for more than 20 years *after they could have executed a valid deed*. That time has not come with the Indians here.

Laches is not imputable or chargeable to a plaintiff because of mere delay or lapse of time, but because such delay would inequitably affect the defendant in asserting his claim.

In *Northern Pacific Railway Company v. Boyd*, 228 U. S. 482, at page 509, the doctrine of laches is thus defined:

"But the doctrine of estoppel by laches is not one which can be measured out in days and months, as though it were a statute of limitations. For what might be inexcusable delay in one case would not be inconsistent with diligence in another and

unless the non-action of the complainant operated to damage the defendant or to induce it to change its position, there is no necessary estoppel arising from the mere lapse of time. *Townsend v. Vanderwerker*, 160 U. S. 171, 186."

In *Halstead v. Grinnan*, 152 U. S. 412, 417, 14 Sup Ct. 641, 643 (38 L. Ed. 495), it is said :

"It (laches) is an equitable defense, controlled by equitable considerations, and the lapse of time must be so great, and the relations of the defendant to the rights such, that it would be inequitable to permit the plaintiff to now assert them.

As said in *Gallagher v. Cadwell*, 145 U. S. 368, 372, 12 Sup Ct. 873, 874 (36 L. Ed. 738), the cases in which the defense of laches has been considered—

"proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the change in conditions or relations during this period of delay it would be an injustice to the latter to permit him to now assert them."

As said in *Penn Mutual Life Ins. Co. v. Austin*, 168 U. S. 685, 698, 18 Sup. St. 223, 228 (42 L. Ed. 626) :

"The reason upon which the rule is based is not alone the lapse of time during which the neglect to enforce the right has existed, but the changes of condition which may have arisen during the period in which there has been neglect. In other words, where a court of equity finds that the position of the parties has so changed that equitable relief can-

not be afforded without doing injustice or that the intervening rights of third parties may be destroyed or seriously impaired, it will not exert its equitable powers in order to save one from the consequences of his own neglect."

As said in *O'Brien v. Wheelock*, 148 U. S. 450, 493, 22 Sup Ct. 354, 371 (46 L. Ed. 636) :

"Its application depends on the circumstances of the particular case. It is not a mere matter of lapse of time, but of change of situation during the neglectful repose, rendering it inequitable to afford relief."

Under the holding of the Circuit Court of Appeals the appellee is disqualified from purchasing, his deed is void, but by the application of the doctrine of laches, the Indian is divested of his title and Ewert becomes the owner of it in direct violation of Acts of Congress and the public policy of the land.

This is contrary to the adjudicated opinions of the courts.

In an opinion of the Supreme Court of Oklahoma not yet officially reported, entitled *Patterson et al. v. Carter et al.* and handed down September 13, 1921, it is said :

"In the first place, it is well settled that an Indian who is under the guardianship of the United States cannot be divested of his restricted lands, whether acquired by allotment or by inheritance, in any manner except that provided for by some act of Congress. In other words, if, in the case at bar, the inherited surplus as we have held, is still re-

stricted, the Indian owner cannot be divested of his title therein except in the manner provided by act of Congress, and then only in the manner provided by law. *Goodrum v. Buffalo*, 162 Fed. 817, 89 C. C. A. 525; *Bell v. Fitzpatrick*, 52 Okla. 574, 157 Pac. 336. It must not be forgotten that these restricted Indians do not become *sui juris* upon reaching their majority. As a dependent people these Indians are still wards of the federal government against which the statute of limitations does not run. In these circumstances it would be futile to hold that the statute of limitations commenced to run against the Indian himself upon reaching his majority, although it did not run against his general guardian, the United States. It is well settled that there can be no adverse possession against the federal government which can form a basis of title by estoppel, or under the statute of limitation, and it has been held that the same rule applies where the lands involved are lands that have been allotted to Indians with restrictions upon the alienation of title thereto by the Indians, so long as such restrictions upon alienation exist. *Miller v. Fryer*, 35 Okla. 145, 128 Pac. 713. Other cases more or less in point are *Wrigley v. McCoy*, 73 Okla. 175 Pac. 259; *McGannon v. Straightlege*, 32 Kan. 524, 4 Pac. 1042; *Sheldon v. Donohoe*, 40 Kan. 346, 19 Pac. 901."

Also see :

166 Pac. 1101 (Okla.).

171 Pac. 331 (Okla.).

169 Pac. 884 (Okla.).

148 Pac. 846 (Okla.).

Barbee v. Hood, 228 Fed. 658.

III.

The court erred in excluding letters of appellee showing his authority as outlined in our assignment number five.

These letters (R. 135-141) certainly bind the appellee as to scope of his employment, and we are at a loss to understand why they were excluded.

We have not discussed in detail Assignment of Error Four. We insist, however, that it was an abuse of discretion for the court to refuse to reopen the case when the letters offered as evidence of good faith so abundantly showed the bad faith and duplicity of appellee as a Special Assistant Attorney General. The letters (R. 49-61) disclose the attempt to influence the Indian Office to approve the Bluejacket deed purchased by Ewert in his own name and a studied and successful attempt to prevent such office from learning that he was the real purchaser of the Redeagle land. This was a fraud alone sufficient to have set aside the deed.

The petition for a rehearing should have been granted for all of the reasons herein given.

Conclusion.

We earnestly urge that we have established herein that the Circuit Court of Appeals was right in holding the deed void and ordering it cancelled as to the minors, but wrong in holding that the adult Indians were barred by their laches.

Respectfully submitted,

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Attorney for Appellants.



No. 186.

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IN THE

Supreme Court of the United States

CARRIE BLUEJACKET, A WIDOW, ET AL.,
APPELLANTS,

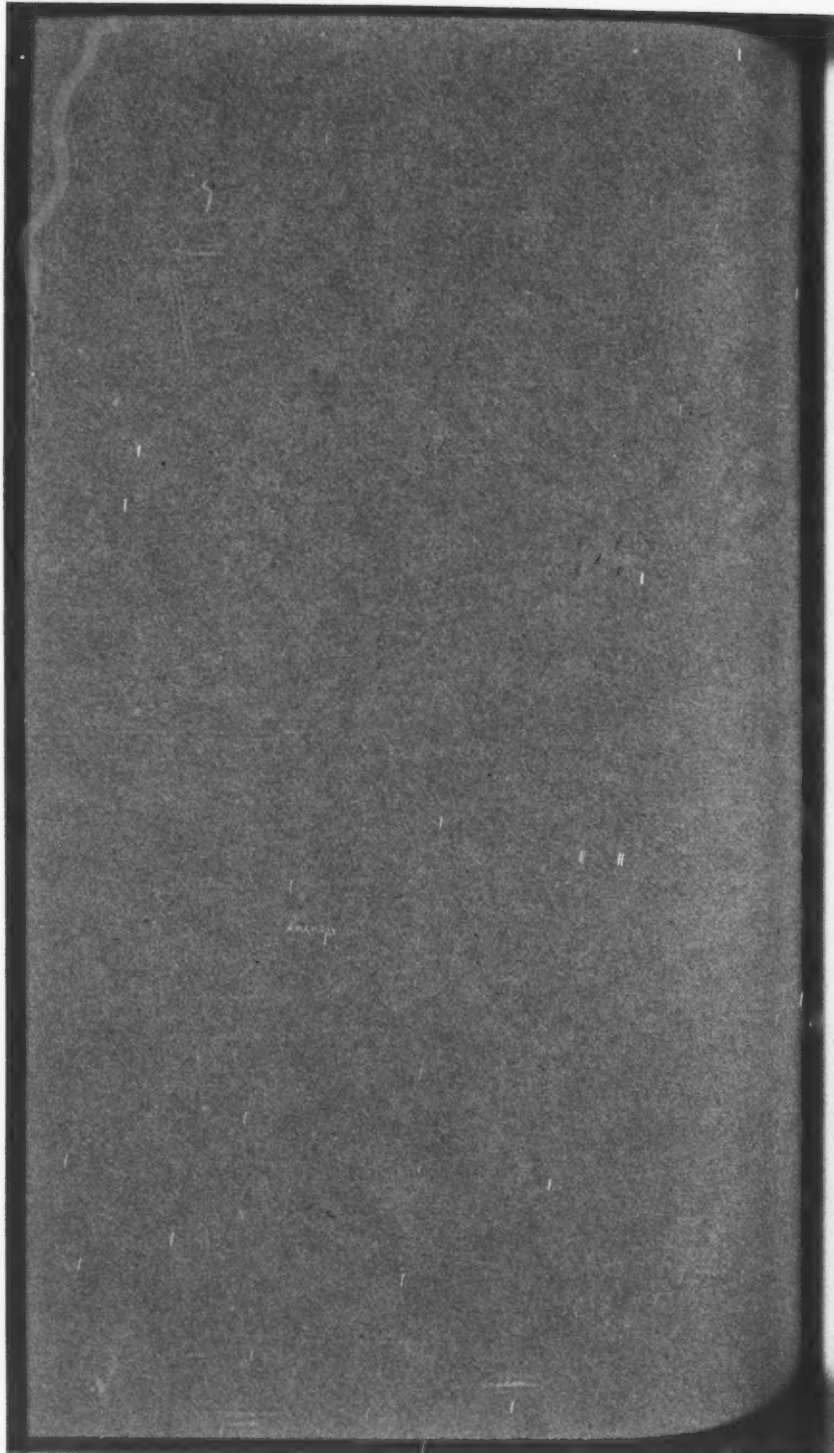
VS.

PAUL A. EWERT, APPELLEE

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

NEWER BRIEF OF THE APPELLEE, EWERT, TO THE
BRIEF OF THE APPELLANTS ON THEIR
CROSS APPEAL.

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INDEX.

	Page
Answer Brief	1
Appellants have abandoned Specifications of Error filed. .	1
Appellants' fabricated Assignments of Error relied upon and argued in their brief	4
Entire brief of appellants on cross appeal should be stricken	5
Circuit Court of Appeals found that the adult plaintiffs were guilty of such laches in the bringing of their suit as to preclude them from maintaining this action	7
The case of Schrimpscher vs. Stockton is directly in point	13
National courts sitting in equity are not bound by the statutes of limitations of states, but they apply the doctrine of laches in analogy to them	16
Circuit Court of Appeals correctly held, etc.	19
The law announced by Circuit Court of Appeals in U. S. vs. Douglas, nor applicable even by analogy, to the case at bar	20
Case of U. S. vs. Hutto not in point	28

Citations.

Act of Congress, May 27, 1902 (32 Stat. 245, 275)	15
Blanset vs. Cardin, 261 Fed. 309	26
Bluejacket vs. Ewert, 265 Fed. 827	23
Campbell vs. Dick, 157 Pac. 1062	20
Elk vs. Wilkins, 114 U. S. 94	21
Felix vs. Patrick, 145 U. S. 317, 331, 332	9, 11

INDEX.

	Page
General Allotment Act (Feb. 8, 1887, c. 119, No. 6, 24 Stat. 390), as amended by Act March 3, 1901, c. 868, 31 Stat. 1447	14
Kelley vs. Boettcher, 85 Fed. 55	16
New vs. Smith, 86 Kas. 1, 119 Pac. 38	19
Okla. Enabling Act, 34 Stat. 267	14
Redd vs. Brunn, 157 Fed. 190	16
Rev. Laws Okla. 1910, Sec. 986	18
R. S. Sec. 997	1
Schrimpscher vs. Stockton, 183 U. S. 290, 296	9, 13
Stat. of Limitations of Okla., Sec. 4655, Laws 1910	16
U. S. vs. Bowling, decided June 1, 1921	26
U. S. R. S. Sec. 2078	3, 27, 29
Webb vs. Logan, 150 Pac. 116	19

No. 186.

IN THE

Supreme Court of the United States

CARRIE BLUEJACKET, A WIDOW, ET AL.,
APPELLANTS,

VS.

PAUL A. EWERT, APPELLEE.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

ANSWER BRIEF OF THE APPELLEE, EWERT, TO THE BRIEF OF THE APPELLANTS ON THEIR CROSS APPEAL.

The plaintiffs in the lower court, the Bluejackets, filed in this case a cross appeal, the purpose of which it must be presumed is intended to challenge the holding of the United States Circuit Court of Appeals, that the action of the adult heirs who deeded their interests in the lands to Ewert through their guardian, the United States, is barred by general laches, and by the analogous Statutes of Limitations of the State of Oklahoma.

Appellants by brief on their cross appeal have abandoned the specifications of error filed with their petition for appeal, and have in their brief substituted new and dissimilar assignments, and their appeal should be dismissed.

As required by Section 997 of the Revised Statutes and by the rules of this court, these appellants with their petition for cross appeal filed certain specifications of error improperly designated

assignments of error (Tr. of R. 266-267). These specifications of error, four in number, go solely to the one point, to-wit: That the Circuit Court of Appeals erred in holding that the adult plaintiffs could not recover and were barred by reason of general laches and by reason of the Statute of Limitations of the State of Oklahoma.

Instead of basing the argument found in their brief in their cross appeal upon these assignments of error, they appear to have abandoned them, and in their stead the appellants in their brief on their cross appeal set up and argue certain bogus or fabricated specifications of error termed "errors assigned" (Brief, pp. 16-17). The language of these "errors assigned" is dissimilar both in kind and in purpose and two of the so-called five "errors assigned" seek to raise two points not specified as error or even mentioned in the genuine specifications filed with their petition on appeal.

Counsel is loath to charge that the attorneys for the appellants have by this method sought to deceive this court, but it apparently is the plain purpose of counsel in setting up these bogus assignments to direct the attention of this court and to argue to this court certain matters which they could not properly argue if they relied upon the real specifications of error upon which their appeal is based.

It is submitted that for these reasons appellants' entire brief filed in this court under date of December 27, 1921, should be stricken and their cross appeal not only be not recognized by this court, but be dismissed.

Appellants' specifications of error filed with the petition for appeal, omitting the caption, are as follows (Tr. of R. 266-267):

"Now comes Carrie Bluejacket, Rosie B. Daugherty, Edward Daugherty, Ida M. Holden, Edward L. Holden, Walter Bluejacket, Edward Bluejacket, Delpha Bluejacket, and Blanche Bear, the appellants in the above entitled cause and file the following assignment of errors, upon which they will rely in this prosecution of the appeal in the above entitled cause from the judgment and decree made by this court on the 7th day of August, 1920:

I.

The Circuit Court of Appeals rightfully adjudged that the appellee's purchase was prohibited by United States Re-

vised Statutes, Section 2078, but erred in adjudging that appellants could not recover by reason of the Statute of Limitations of Oklahoma, or delay in bringing their suit.

II.

The Circuit Court of Appeals for the Eighth Circuit erred in ruling that these appellants are barred of their right of action on account of delay in bringing their suit, since there had been no change in said property affecting the value thereof, nor any change in the title; and, being Quapaw Indians, under the guardianship of the United States, there is no presumption that they knew of their right, and no proof of such fact in the record.

III.

The United States Circuit Court of Appeals for the Eighth Circuit erred in ruling that the plaintiffs were barred of their right of action on account of laches. The appellee obtained his deed in violation of the express inhibition of the Acts of Congress and his possession under such deed was illegal, unlawful, and at all times that of a trespasser, and color of title cannot be obtained by acts prohibited by public policy, nor can possession once so obtained ripen into lawful or rightful adverse possession.

IV.

The United States Circuit Court of Appeals for the Eighth Circuit erred in ruling and holding that these appellants were barred of their right of action to recover the real estate described in their bill of complaint by reason of laches in bringing their suit, and erred in ruling that 'the bill contains no allegations and the proofs afford no facts to take the case out of the ordinary rule,' which requires suits to set aside instruments procured by fraud to be promptly begun and prosecuted, and erred in ruling that the time within which these appellants could have brought these suits had expired when this suit was begun, since the applicable Statute of Limitations in subdivision 4, of Section 4655 Revised Laws of Oklahoma, 1910, which reads:

'Fourth. An action for the recovery of real property not hereinbefore provided for, within fifteen years.'

Wherefore, the appellants pray that the said judgment and decree dismissing the bill herein as to these appellants be reversed and that the said United States Circuit Court of Appeals for the Eighth Circuit be ordered to enter a decree reversing the decision of the trial court and directing the said trial court to enter a decree as prayed for in the appellants'

bill, or that the said Circuit Court of Appeals be directed enter a decree reversing the trial court's decree, and to enter a decree as prayed for in the petition of these appellants.

A. SCOTT THOMPSON and
HIRAM W. CURREY,
Attorneys for the Appellants

(Endorsed: Filed in U. S. Circuit Court of Appeals
Nov. 6, 1920.)"

Appellants' fabricated assignments of error relied upon and argued in their brief.

The fabricated assignments of error relied upon by counsel and argued in their brief, are found on pages 16 and 17 of the brief on cross appeal and are as follows:

I.

"The court erred in holding that the appellants here are barred of their right of action on account of delay in bringing suit, because, the deed being void, the land remained restricted, and no doctrine of laches is imputable to the Indians, and further, because the delay has not occasioned any injury to Mr. Ewert.

II.

The court erred in holding that the adult plaintiffs were barred of their right of action on account of laches because the effect of such a holding is to divest the restricted Indians of his title and to vest same in Paul A. Ewert, in direct opposition to and violation of a positive statute of the United States and the public policy announced therein.

III.

The court erred in denying said adult plaintiffs relief by holding that under the laws of the State of Oklahoma the Statute of Limitations had run, and this was because appellant, Paul A. Ewert, had cited to said court the case of *Campbell v. Dick*, 157 Pac. 1062, as authority for the position taken by the court, when in fact the Supreme Court of the State of Oklahoma, in *Campbell v. Dick* on rehearing in 177 Pac. p. 520, expressly held that the Statute of Limitations was fifteen years.

IV.

The court erred in refusing to reopen the case before judgment was announced, and permit testimony and exhibits

showing a fraud upon the Secretary of the Interior in securing the approval of this deed in question.

V.

The court erred in refusing to admit testimony of letters written by the defendant, Paul A. Ewert, prior to the time of his purchase of the lands in question, showing the assumed authority that he had, and clearly establishing the allegations of the petition of the plaintiffs that he was engaged generally in the business of examining and quieting titles of Quapaw Indians at the time of his purchase of these lands. These letters are found in the Record, pages 135 to 141."

Entire brief of appellants on cross appeal should be stricken.

The files in this case show that on December 27th, 1921, the Bluejackets by their attorney Arthur S. Thompson, filed in this court a brief which is entitled, "No. 173, Paul A. Ewert, Appellant, vs. Carrie Bluejacket, a Widow, et al., Appellees. No. 186, Carrie Bluejacket, a Widow, et al., Appellants, vs. Paul A. Ewert, Appellee. Statement, Brief and Argument of Appellants in 186."

It will be noticed that while this brief is entitled as hereinbefore set forth that it is further entitled, "Statement, Brief and Argument of Appellants in 186." A reading thereof discloses the fact that it not only appears to be a brief upon the only point in their appeal, to-wit: That the Circuit Court of Appeals erred in holding that the adult heirs were barred from recovering by general laches and the Statute of Limitations of the State of Oklahoma, but that it also argues generally the points raised by the appellant, Ewert, on his appeal. This brief for the Bluejackets was filed in this court as of December 27th, 1921, while the Ewert brief was not filed until January 13th, 1922. It will thus appear that the argument found in their brief cannot be construed as an answer brief and it is therefore filed out of time and should be stricken as uselessly encumbering the record and uselessly taking the time of this court. This portion of appellants' brief is found on pages 18 to 38 thereof, inclusive.

If this court, notwithstanding the facts hereinbefore alleged, to-wit: That counsel for appellants have abandoned the assignments of error upon which they relied in the taking of their appeal, shall of its own motion notice the holding of the United States

Circuit Court of Appeals that the adult heirs of William Bluejacket who, through the United States of America, made, executed and delivered their deed to Ewert, are barred by general laches and by the analogous Statute of Limitations of the State of Oklahoma, then we desire to submit an argument in support of the holding of the Circuit Court of Appeals.

Before going into the argument, however, we desire to direct the attention of this court to the petition for rehearing on this point filed by appellants in the Circuit Court of Appeals. In that petition they direct the attention of the Circuit Court of Appeals to the exact points now attempted to be directed to the attention of this court. The petition for rehearing there filed, omitting the caption, is as follows (Tr. of R. p. 264):

"The appellants, Carrie Bluejacket et als., request a rehearing and reargument on the judgment in the above cause rendered and filed herein on the 1st day of March, 1920, upon the grounds and for the reasons following, to-wit:

(1) If the Statute of Limitations of Oklahoma is applicable it is controlled by subdivision four (4) of Section 4655, Revised Laws of Oklahoma of 1910, and the above action was not barred. *Campbell v. Dick*, 176 Pac. 520 (Okla.).

(2) Because the judgment of the court fails to give consideration to the fact that the lands claimed by appellee, Ewert, were allotted Quapaw Indian lands with restrictions against alienation thereon, and any conveyance made by the heirs except as provided by Acts of Congress is utterly void.

(3) The deed being void, the land was and is now restricted from sale except as provided by law. This being the condition, the Statute of Limitations does not run against the Indian heir and laches or estoppel are not imputable to the restricted land owner. * * *

Respectfully submitted,

HIRAM W. CURREY, Joplin, Mo.,
A. SCOTT THOMPSON, Miami, Okla.,
Attorneys for Petitioners.

We, Hiram W. Currey and A. Scott Thompson, hereby certify that we are counsel for the petitioners, and that in our opinion the above and foregoing petition for rehearing interposed in the above styled case, and each and every part thereof, is well founded on point of law and is proper to be

filed and considered by this court, and that such petition is offered in good faith and not for delay.

HIRAM W. CURREY.

A. SCOTT THOMPSON.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Apr. 24, 1920."

This petition for rehearing so presented to the Circuit Court of Appeals, was, after due consideration, denied.

The Circuit Court of Appeals found that the adult plaintiffs were guilty of such laches in the bringing of their suit as to preclude them from maintaining this action.

The plaintiffs in this suit executed the deed here sought to be set aside, under date of April 8, 1909, by themselves through the proper officers of the Interior Department of the United States (Tr. of R. p. 11). The petition in this case was not filed until seven years and two months after the date of the deed, to-wit: On June 12, 1916 (Tr. of R. p. 14). The lands were first advertised to be sold approximately a year prior to the date of the deed.

Defendant in paragraph twelve of his answer pleads general laches, and in paragraph thirteen as a separate defense, pleads and relies upon the Statutes of Limitation of actions of the State of Oklahoma in bar of plaintiffs' right to maintain the suit and recover (Tr. of R. p. 33). Plaintiffs in their petition expressly allege that since the purchase of said land valuable lead and zinc mines have been discovered and opened up and that the land had been mined and that large sums of money have been taken therefrom from the sales of ore mined from said land. The language of the petition is as follows (Tr. of R. 7):

"Plaintiffs further state that said defendant after said deed was duly approved, entered into the possession of said land, and has since occupied the same; that all of said land is in cultivation, being rich bottom land with the exception of about ten or fifteen acres, and that a valuable lead and zinc mine has been opened on said land and it has been mined for some time by this defendant through his lessees, and, that this defendant has taken large sums of money therefrom as his royalty upon the sales of ores mined therefrom, and that said land is located in the mineralized belt, and that a fair and reasonable market value of said land at the present

time would be not less than fifteen thousand dollars, and these plaintiffs further aver that the said defendant has had possession of said land for farming purposes for and during the period of time since July 29, 1909, and that a reasonable farm value thereof is the sum of four hundred dollars per year."

Plaintiffs further expressly allege that the said land has been encumbered by a mortgage in the sum of \$3,500.00 and that said mortgage is held in good faith by the mortgagee, Lillias Barrowman. The language of the petition in that respect is as follows (Tr. of R. 7):

"Plaintiffs aver that on the 20th day of December, 1910, said defendant mortgaged the land so acquired from these plaintiffs to Lillias Barrowman, to secure the payment of the sum of thirty-five hundred dollars borrowed from said mortgagee on said land, and that the said mortgagee now is the holder in good faith and for value of said mortgage and note, and that the same constitutes a mortgage lien upon the plaintiffs' aforesaid land, for the sum of thirty-five hundred dollars and the accrued interest thereon."

The defendant in his answer admits that the lands are mineralized lands, and pleads as follows (Tr. of R. p. 24):

"Defendant admits that some prospecting and mining operations have been carried on upon said land, and admits that he has received some royalty money therefrom, but charges the fact to be that he and his lessees have spent approximately fifty thousand dollars in trying to discover ore upon said land and endeavoring to mine the same, and by reason of such operations, have lost in excess of twenty-five thousand dollars."

The Circuit Court of Appeals held that these adult plaintiffs were guilty of such laches by reason of the premises, as to make it inequitable to allow the maintenance of the suit at this time. The court uses the following language (265 Fed. 829):

"The bill contains no allegations and the proofs afford no facts to take the case out of the ordinary rule and to make it equitable to allow its maintenance at this time, unless it be the fact that the plaintiffs were Indians. The adult plaintiffs were free to make conveyance of this land, even though they were Indians, and their tribal relations had been severed, and they were chargeable with the same diligence as white people

in discovering and pursuing their legal remedies. *Felix v. Patrick*, 145 U. S. 317, 331, 332; *Schrimpscher v. Stockton*, 183 U. S. 290, 296."

In commenting upon the case of *Felix v. Patrick*, *supra*, cited by the Circuit Court of Appeals in support of their holding, counsel for the appellant in their brief make the following statement (p. 45):

"The case of *Felix v. Patrick*, 145 U. S. 317, cited in the opinion, is not, as we view it, supportive of, or even analogous to, the case at bar; because (1) there was no restriction against alienation of the land located; the Indian had a right to issue the power of attorney for location and give deed to the land; (2) that F located the land for her as her representative and an implied trust resulted, which did not prevent an adverse holding; (3) that the case is bottomed on fraud; (4) the time was twenty-eight years, and in the meantime the land had passed into the hands of innocent purchasers, had been platted into town lots, streets and alleys opened, becoming immensely valuable, and the loss would fall on innocent persons not connected with the fraud. *At all times the Indian could have disposed of said land without any restriction or supervision of the Federal Government.*"

A mere casual reading of the syllabus of the Supreme Court in that case shows that counsel is either trying to mislead this court or that he has not read even the syllabus after a cursory fashion. The syllabus states that the "certificate of landscript expressly recites the provisions of the Act of 1854 under which the certificate of landscript was issued, and says, 'which enacted that no transfer or conveyance of any of said certificates of scrip shall be valid.' " The statement made by counsel and italicised in his brief as above quoted, that "at all times the Indians could have disposed of said land without any restriction or supervision of the government" is absolutely untrue.

Counsel further states: "No innocent purchaser is involved here" and yet his bill expressly states that "a valuable lead and zinc mine has been opened on said land and it has been mined for some time by this defendant *through his lessees*, and that this defendant has taken large sums of money therefrom as his royalty upon the sales of ore mined therefrom." The bill further expressly states that the lands in question have been encumbered by

a mortgage in the sum of thirty-five hundred dollars to Lillias Barrowman "and that the said mortgagee now is the holder in good faith and for value of said mortgage and note and that the same constitutes a mortgage lien upon the plaintiffs' land for the sum of thirty-five hundred dollars and interest accrued thereon."

The defendant answers in effect that he and his lessees have spent fifty thousand dollars in prospecting and mining said lands and have lost twenty-five thousand dollars in said venture.

Counsel further state: "No innocent purchaser is involved here, Ewert himself is charged with knowledge of the law," and yet the record shows that Ewert purchased this land in good faith, not from the Indians, but from the Government at Government sale; that he never saw the Indians; never had any business transaction with them; never paid them personally any of the money, nor was he personally acquainted with them; that after Ewert had bid upon said lands and prior to the approval of the deed that he personally talked the matter over with the Attorney General of the United States, Mr. Wickersham, and that Mr. Wickersham, prior to the approval of the deed, expressly stated to Ewert "that he saw no legal reason why he should not purchase the land in question" (see Ewert Brief, p. 64).

That the Commissioner of Indian Affairs expressly held in an opinion, that "Ewert acted within the law" in making the purchase.

That Secretary of the Interior Fisher, in an official letter to Congressman Davenport under date of June 8, 1911, expressly stated (Ewert Brief, p. 64):

"Mr. Ewert is not an employe of the Indian Office and in strictness was within his legal rights in bidding on the land in question."

That prior to this transaction the Attorney General of the United States expressly held under date of May 8, 1907, in construing a similar statute:

"That where the employment had neither duration and continuance of duty, nor duration and continuance of term the attorneys so employed would not be regarded as an *officer* within the spirit and letter of the law" (Ewert Brief, p. 83).

Ewert's appointment as Special Assistant to the Attorney General was "to assist in the institution and prosecution of suits to

set aside deeds made to certain allotments in Quapaw Indian Agency." His letter of appointment in express language provided as follows: "This appointment is subject to any change which may be made by this Department," and he was hired by the month.

In the case of *Felix v. Patrick*, *supra*, the Supreme Court held against Patrick on each point, notwithstanding the fact that in that case Congress was expressly appealed to and enacted a law confirming Patrick in his title, and yet held plaintiff guilty of laches. In holding that Felix was guilty of laches in the above case, the Supreme Court said (145 U. S. 331-333):

"It was held by this court in *Badger v. Badger*, 2 Wall. 94, in speaking of the excuses for laches, that 'the party who makes such appeal should set forth in his bill, specifically, what were the impediments to the earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how, and when, he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case, upon his own showing, without inquiring whether there is a demurrer or formal plea of the Statute of Limitations contained in the answer.' Sophia Felix and her husband must have known that she had parted with the scrip, yet she lived until 1865, and her husband until 1882, without apparently making any effort to discover it until 1887, when their intelligence seems to have suddenly sprung into activity upon their becoming citizens of the United States. It is scarcely necessary to say in this connection that, while until this time they were not citizens of the United States, capable of suing as such in the Federal Courts, the courts of Nebraska were open to them as they are to all persons irrespective of race or color. *Swartzel v. Rogers*, 3 Kansas, 374; *Blue Jacket v. Johnson County*, 3 Kansas, 299; *Wiley v. Keokuk*, 6 Kansas, 94. It was said by this court in *Wood v. Carpenter*, 101 U. S. 135, 140, that in this class of cases the plaintiff is held to stringent rules of pleadings and evidence, and especially must there be distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered, and what the discovery was, so that the court may clearly see whether by ordinary diligence the discovery might not have been before made. See also *Stearns v. Page*, 7 How. 819, 829; *Wollensak v. Reiher*, 115 U. S. 96; *Godden v. Kimmell*, 99 U. S. 201, 211. The mere fact that in 1887 these plaintiffs took their lands in severalty and became citizens, does not

adequately explain how they so quickly became cognizant of this fraud, or why they had remained so long in ignorance of it.

But, conceding that the plaintiffs were incapable, so long as they maintained their tribal relations, of being affected with laches, and that these relations were not dissolved until 1887, when they were first apprised of their right to this land, it does not necessarily follow that they are entitled to the relief demanded by this bill. The real question is, whether equity demands that a party, who, 28 years ago, was unlawfully deprived of a certificate of muniment of title of the value of \$150, shall now be put in the possession of property admitted to be worth over a million. The disproportion is so great that the conscience is startled, and the inquiry is at once suggested, whether it can be possible that the defendant has been so guilty of fraud so gross as to involve consequences so disastrous. In a court of equity, at least, the punishment should not be disproportionate to the offense, and the very magnitude of the consequences in this case demands of us that we should consider carefully the nature of the wrong done by the defendant in acquiring the title to these lands. He is not charged in the bill with having been a party to the means employed in obtaining the scrip from Sophia Felix, or with being in collusion with the unknown person who procured it from her. More than that, the allegations of this bill do not satisfy us that she did not receive full value for the scrip."

In the case at bar, it would be monstrous to permit these plaintiffs to now recover under these circumstances. It is apparent from the record that the real plaintiffs are not the Bluejackets, but the lawyers who procured the plaintiffs to institute this suit on a percentage basis. The plaintiffs themselves stood by during seven years and two months and were satisfied with their bargain. They received from Ewert, through the Government, one thousand dollars more than any other bidder offered at this Government sale. In this case, as in the Patrick case, they got full value for their land. They stood by and saw Ewert and his lessees spend fifty thousand dollars in the prospecting of said lands and in the erection of large mining plants, and saw them mine the land and lose large sums of money in the mining thereof. They are chargeable also with notice of the mortgaging of said land to Lillias Barrowman.

As was said in the Patrick case, it would "be monstrous" in this case to now permit these plaintiffs to recover back this land

after some of it had passed by mortgage into the hands of innocent persons and other portions of it had gone to Ewert's lessees in the mining business and these large sums of money had been expended by Ewert and his lessees in developing the land. It is safe to say that the Indians themselves would never have instituted the suit had they not been solicited and importuned by the men who sign themselves as the attorneys for the plaintiffs.

In the case at bar, the lands in the first instance were inalienable, but under the Act of 1902, Congress empowered the Secretary of the Interior to sell these inherited Indian lands for the heirs, and the Secretary of the Interior did sell the lands for the heirs to Ewert in a manner in every way lawful.

Counsel in their brief (page 48) state:

"Here it is admitted Ewert knew he was dealing with a restricted Indian."

This statement is misleading, if not false. The Act of Congress permitting the sale of this inherited Indian land *in effect removed the restrictions* to the extent of permitting the Indian, through the Secretary of the Interior, to sell his lands according to the laws of the United States, and Ewert was not dealing with the Indians. He was dealing with the United States as the guardian of the Indian and he made his purchase through the United States and he delivered the money to the active guardian, to-wit: The Secretary of the Interior of the United States. Was not the sale then "for and on account of the United States" and within the exception?

The case of *Schrimpscher v. Stockton*, supra, cited by the Court of Appeals is directly in point.

Counsel for the Bluejackets seems to think that the learned judges of the Court of Appeals did not read the case of *Schrimpscher v. Stockton*, 183 U. S. 290, with understanding, and claims that the case is not analogous.

One of the sections of the syllabus of the court in that case reads as follows:

"Even if Indians while maintaining their tribal relations are not chargeable with laches, or failure to assert their claims within the time prescribed by the statutes, they lose

their immunity when their relations with their tribe are dissolved and they are declared to be citizens of the United States."

On page 296 of the opinion the court lays down the following proposition of law:

"Conceding, but without deciding, that so long as Indians maintain their *tribal relations* they are not chargeable with laches or failure to assert their claims within the time prescribed by statutes, as to which see *Felix v. Patrick*, 145 S. 317, 330, S. C., 36 Fed. Rep. 457, 461; *Swartzel v. Rogers*, 3 Kansas, 374; *Blue Jacket v. Johnson Co.*, 3 Kansas, 291; *Wiley v. Keokuk*, 6 Kansas, 94; *Ingraham v. Ward*, 56 Kansas, 550, they would lose this immunity when their relations with their tribe were dissolved by accepting allotments of lands in severalty."

In like manner, the Quapaw Indians were citizens. The lottee, Bluejacket, in this case was a citizen of the United States and the State of Oklahoma. General Allotment Act (Feb. 1887, c. 119, No. 6, 24 Stat. 390), as amended by Act March 1901, c. 868, 31 Stat. 1447; Oklahoma Enabling Act (Act June 16, 1906, c. 3335, 34 Stat. 267). His heirs likewise are citizens of the United States for the same reason.

In the case at bar, the heirs of Charles Bluejacket, deceased, waited for seven years and two months before they instituted this suit. As hereinbefore set forth, they saw the defendant Ewert and his lessees expending fifty thousand dollars in the prospecting of the said land for ore and in the erection of huge mills and concentrating plants for mining purposes, and yet remained silent. The defendant Ewert plead general laches, and the Circuit Court of Appeals found from the pleadings and general testimony that the plaintiffs were guilty of such general laches. The finding of the court in that respect ought not by this court be disturbed.

Counsel cites numerous cases from the Oklahoma courts and other courts to sustain the general doctrine, which is not contradicted, that where deeds are obtained by purchasers to Indian lands which are inalienable, that laches do not run, nor do the Statute of Limitation of the state apply until at least after the removal of restrictions either by expiration or by statute. As a general proposition, counsel for Ewert concede that to be true.

However, counsel for the Bluejackets overlook the fact that in this case the disability to sell had been removed. The Congress of the United States provided a way out by the provisions of the Act of Congress approved May 27, 1902 (32 Stats. 245, 275), which reads as follows:

"That the adult heirs of any deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him may sell and convey the lands inherited from such decedent, but in case of minor heirs their interests shall be sold only by a guardian duly appointed by the proper court, upon the order of the court made upon petition filed by the guardian, but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey a full title to the purchaser, the same as if a final patent without restrictions upon alienation had been issued to the allottee."

The lands which in this case are the subject-matter of controversy, were sold by the Secretary of the Interior under and pursuant to the provisions of this Act. Ewert never saw the Indians; he had no business relations with them; he bought the land through the Secretary of the Interior of the United States in the manner provided by law. A different rule is therefore applicable in his case and both the adult heirs and the minor heirs are chargeable with the ordinary rules of laches. The sale in fact was for and on account of the United States as guardian of these Indians.

The numerous Oklahoma cases cited by counsel for the Bluejackets are not in point because the lands which are there the subject of controversy are in each instance inalienable lands and were purchased *directly from the Indian allottees* or the heirs in direct violation of law. In the case at bar the lands were not purchased in direct violation of law but in accordance with the provisions of the Act of Congress permitting the lands to be sold in the manner in which they were sold.

The Act of Congress above referred to expressly provides that the interests of the minor heirs shall be sold only by guardians duly appointed by the proper court upon the order of the court made upon petition filed by the guardian. In that respect the sale was in fact a guardian's sale under the laws of Oklahoma.

This was done in the case at bar and the sale of the interests of the minor heirs was made upon the order of the court in the manner provided by law and the sale is also expressly governed in the matter of the Statutes of Limitations of Oklahoma by Section 4655, Laws of 1910, which reads as follows:

"4655. Limitation of Real Actions. Second. An action for the recovery of real property sold by executors, administrators or guardians, upon an order or judgment of a court directing such sale, brought by the heirs or devisees of the deceased person, or the ward or his guardian, or any person claiming under any or either of them, by the title acquired after the date of the judgment or order, within five years after the date of the recording of the deed made in pursuance of the sale."

National courts sitting in equity are not bound by the statutes of limitations of states, but they apply the doctrine of laches in analogy to them.

It is the settled law that the national courts sitting in equity *are not bound* by the statutes of limitations of the state but that they only apply the doctrine of laches in analogy to them. In some cases the national courts find parties guilty of laches even before the expiration of the time fixed by the statutes of limitations of the respective states. This is the doctrine laid down by the Circuit Court of Appeals for the Eighth Circuit in the case of

Redd v. Brunn, 157 Fed. 190,

where the court, speaking through circuit judge Sanborn, said:

"If a suit discloses no extraordinary facts or circumstances, they apply the bar of laches at the expiration of the time prescribed by the statute of the state for the limitation of an action at law of like character, but if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit *after a briefer*, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it."

Citing with approval:

Kelley v. Boettcher, 85 Fed. 55.

In the case at bar the Circuit Court of Appeals for the Eighth Circuit had a right to and undoubtedly did take into consideration the fact that the defendant Ewert in this case purchased the land in absolute good faith; that he paid a full and fair consideration for it, to-wit: One thousand dollars more than any other bidder; that after he made his bid and prior to the approval of the deed he conferred with his superior officer, the Attorney General, George W. Wickersham, and that the Attorney General advised him that he saw no reason why he should not make the purchase; that before the deed was approved, the Secretary of the Interior advised him that he was within his legal rights in purchasing the land; that Attorney General Wickersham, after the approval, advised the Secretary of the Interior that Ewert had agreed to re-deed the land if he thought it necessary or even expedient to do so, and that both the Secretary of the Interior and the Attorney General refused to ask Ewert to re-deed the land. That every Secretary of the Interior and every Attorney General since that time as a matter of common, every-day honesty, has refused to institute suit in the name of the United States as guardian for the said Indians to have the said deed declared null and void; that since the purchase of the said land and since Ewert offered to re-deed the said land, that Ewert has subleased the land to various sublessees and that he and his sublessees have expended in excess of fifty thousand dollars in prospecting said land and in erecting large concentrating plants on it and mining said land; that in the improvement of said land and the endeavor to locate mineral in paying quantities thereon, they have lost in excess of twenty-five thousand dollars.

The Circuit Court of Appeals undoubtedly took into consideration all of these facts and considered them of such character that it believed that the plaintiffs who knew of all of these things from the very beginning, were guilty of laches in not instituting the suit prior to seven years and two months after the execution and delivery of the deed to the defendant Ewert.

The plaintiffs in this suit must be bound by the allegations contained in their petition, even though said allegations were in fact maliciously and wilfully false and known by them to be false. They ground their action on fraud, alleging (though falsely) that Ewert procured the purchase of said land by fraud. First, that he failed to inform the Secretary of the Interior of the United

States of the real value of the land, which they say was worth thousand dollars, instead of five thousand. Second, that Ewert knew that there were purchasers who were willing to pay ten thousand dollars for the land and that he discouraged such persons from bidding and told them the land was not worth that much and that he misled the Secretary of the Interior and withheld from him certain information which it was the duty of Ewert to give to the Secretary of the Interior, and they then asked that the court find that the title to said land conveyed to him be considered to be held in trust for the use and benefit of the grantors of said deed, etc.

The action is in the nature of rescission upon the ground of fraud. The action is evidently brought under and pursuant to the provisions of Section 986, Revised Laws of Oklahoma, 1906, which reads as follows:

"Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules:

"First. He must rescind *promptly* upon discovering facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and,

"Second. He must restore to the other party everything of value which he has received from him under the contract or must offer to restore the same, upon condition that said party shall do likewise, unless the latter is unable or positively refuses to do so."

If this action is one for rescission based upon the grounds of fraud practiced both upon the plaintiffs in this case and the Secretary of the Interior of the United States in the manner alleged in the petition, then it was the duty of these plaintiffs to rescind *promptly*. They have not done so. It must be patent from the pleadings and the evidence adduced that every fact that was in their possession at the time they instituted this suit in June, 1907, seven years and two months after the deed was approved and recorded, was in their possession at the time the deed was executed. Plaintiffs have failed to promptly rescind and are guilty of such laches as bars them from maintaining this suit.

The Circuit Court of Appeals correctly held that the time within which the adult grantors could have brought the suit under the statutes of limitation applicable to suits or cases under the law of Oklahoma, had then expired.

Clearly, the plaintiffs, if not suing for rescission under the above section, grounded their suit in this case upon the allegations of fraud practiced upon the Secretary of the Interior and upon the plaintiffs themselves, *supra*. This being true, the case clearly falls within the statute of limitations of the laws of the State of Oklahoma, known as subdivision 3, Section 4657, Revised Laws, 1910, which provides:

"Within two years, * * * an action for relief upon the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud."

In holding as it did, the Circuit Court of Appeals had before it the decisions of the Supreme Court of the State of Oklahoma and of the State of Kansas, from the statutes of which state the statutes of limitation of Oklahoma were taken.

The case of

Webb v. Logan, 150 Pac. 116,

is similar in character to the suit at bar, and the charges of fraud are in similar language. The court there said:

"Plaintiffs seek to quiet title and obtain possession of the property in controversy, but the gist of the action is an action to set aside the deed on account of fraud and the action must be brought within two years after the discovery of the fraud."

Citing:

New v. Smith, 86 Kansas, 1, 119 Pac. 38.

The first paragraph of the syllabus in the case of *New v. Smith*, *supra*, is as follows:

"An action to recover the possession of a tract of land the real gravamen of which is to set aside a recorded deed which purports to have been executed by the plaintiff, for the reason that such deed was fraudulently obtained by the grantee, is in form an action in ejectment but in substance is an action for relief on the ground of fraud."

The third paragraph of the syllabus in that case is as follows:

"The limitation of time within which such action may be brought is two years after the discovery of fraud as provided by Section 17 of the Code of Civil Procedure (Gen. St. 1909, par. 5610), subject to being tolled as in other cases, and not the fifteen years as provided in Section 15 of the Code (Gen. St. 1909, par. 5608)."

Having adopted these sections of the Kansas Code, the courts of Oklahoma adopted therewith the construction placed thereon by the Kansas courts.

The Circuit Court of Appeals also had the benefit of the reasoning of the Supreme Court of the State of Oklahoma on this identical question in the case of *Campbell v. Dick*, 157 Pac. 1062.

It is true that upon rehearing, by an opinion rendered in November, 1918, 176 Pac. 520, the Supreme Court of Oklahoma took a different view and held that the fifteen year statute and not the two year statute applied, but in order to take that view it had to reverse its former holding as to the *purpose of the action* and to hold that the real purpose of the action was the recovery of the possession of land rather than an action for fraud to rescind the contract. However, this opinion of the court should not govern in this case because at the time the action was brought the suit was ruled by the opinion of the Supreme Court of the State of Kansas in the case of *New v. Smith*, 119 Pac. 380, which was affirmed on rehearing in the recent case reported in 155 Pac. 1080, and which was followed by the Supreme Court of Oklahoma in its decision rendered on June 22, 1915, in the case of *Webb et al. v. Logan*, 150 Pac. 116.

The law announced by the Circuit Court of Appeals in *United States v. Douglas*, nor applicable even by analogy, to the case at bar.

The brief filed by counsel for the Bluejackets in this case is a mixed brief. The Bluejackets appealed only from the decision of the court upon the question of the correctness of the ruling of the Circuit Court of Appeals in holding that the action of the adult heirs is barred by the statute of limitations. Notwithstanding that fact, he devotes the greater part of his brief, to-wit: The first thirty-eight pages, to a discussion of the points raised by appellant Ewert in his appeal. We therefore take the liberty of

including in this brief at this time a reply to that portion of the argument of counsel for the Bluejackets, reserving the right to file a reply brief if counsel for the Bluejackets files an answer brief to the Ewert brief on his appeal.

Counsel for the Bluejackets makes many misstatements, both as to the evidence and the law, which we cannot in this brief well discuss. However, he places great reliance upon the case of *United States v. Douglas*, 190 Fed. 482, upon which decision the Circuit Court of Appeals grounded its finding in this case.

Counsel for Ewert have no quarrel with the decision of the Circuit Court of Appeals in the case of *United States v. Douglas*, *supra*, except as to the purpose of the Statute, Section 2078. A full discussion, however, of this statute and its derivation and purpose is found in the early pages of appellant, Ewert's main brief, and need not be here repeated.

However, the decision of the Circuit Court of Appeals in the Douglas case cannot even be applied by analogy to the case at bar. In that case, the defendant Douglas was clearly employed in Indian affairs. The opinion recites that she was for many years employed by the Government as a female industrial teacher in the schools of the reservation belonging to the tribe of Indians from the members of whom she purchased 256 head of cattle branded "I. D." The opinion recites that these cattle were furnished by the United States and issued to the Indians. This clearly indicates the fact that the persons from whom she purchased these cattle were tribal Indians and that these cattle were issued to the Indians in question in the form of rations. The court further says in its opinion (190 Fed. 483):

"It does not appear whether the Indians of whom she bought the cattle were citizens of the United States. It is probable to be presumed that they were not."

Elk v. Wilkins, 114 U. S. 94.

It is therefore clear that if the provisions of Section 2078 were applicable at all, that the court properly found against her contentions. But the situation in the case of *Bluejacket v. Ewert* is entirely different. The Bluejackets were not tribal Indians. They were allotted Indians and citizens of the United States; Ewert had absolutely no business relations with them and could not possibly in any wise be placed in a position by reason of his

employment, where he could have influence over them. Ewert's employment was not in Indian Affairs. He was employed in *legal affairs*. His letter of employment in express terms states that he was employed "to assist in the institution and prosecution of suits to set aside deeds made to certain allotments in Quapaw Indian Agency" (Rec. p. 26). He was not even employed at the time of the purchase, in suits involving Quapaw Indian lands. Quapaw Indian Agency had supervision and control over seven tribes of Indians, of which the Quapaw Indians happened to be one of the tribes, but the suits in question were not instituted to set aside deeds from Quapaw Indians, but entirely Indians of other tribes, to-wit: Shawnees, Wyandottes and Ottawas.

Counsel for the Bluejackets, in their petition state and in their brief, keep shouting at the court that Ewert was employed by the Government to protect and preserve the property of the Indians, whereas in truth and in fact, he had no business relations or concern whatever with the Indians. He was employed by the Department of Justice in legal affairs—purely legal affairs. He had no authority and possessed no power under his delegated authority, to do anything other than assist the Attorney General in the institution and prosecution of suits to set aside deeds to certain lands, not Quapaw Indian lands—there is no proof to show that—but deeds of Indians of tribes other than Quapaw tribes and lands other than Quapaw Indian lands.

There is not a line of evidence to show that Ewert was ever employed in any capacity whatsoever, other than as outlined in his letter of employment (Rec. p. 26). There is an absolute absence of all testimony of any kind to show that Ewert was ever employed in any capacity in Indian Affairs. The only evidence adduced is that Ewert as a lawyer prepared certain pleadings in certain suits to set aside what were known as Marshal's Deeds conveyances. Not conveyances of Indian lands by the Indians themselves, but conveyances of Indian lands by partition proceedings instituted by the Government itself in the Territorial Courts of the Eastern District of Oklahoma for the purpose of partitioning and selling, by means of an order of the court, through the United States Marshal, certain inherited Indian lands, by reason of the fact that a division of the lands could not be made without injury to the estate because of the smallness of the allotments.

The Circuit Court of Appeals in its decision in this case (265 Fed. p. 828), says:

"The facts in the present case do not disclose the direct exercise of any influence over the Indians. It is not shown that the defendant ever saw or communicated with any of the plaintiffs or that the plaintiffs were conscious that the defendant was employed in Indian Affairs."

This court certainly cannot accept the reasoning of the writer of the opinion, the Honorable Circuit Judge Munger, from which he deduces the fact that Ewert was employed in Indian Affairs. Listen! Here are the premises of the finding, as set forth in the opinion of the court (*Bluejacket v. Ewert*, 265 Fed. 827):

"All the facts shown in evidence in relation to Mr. Ewert, the defendant, that are claimed to bring his purchase within the condemnation of this statute may be shortly stated. Mr. Ewert was an attorney at law formerly residing in Minnesota. On October 23, 1908, the Attorney General of the United States appointed him as a Special Assistant to the Attorney General to assist in the institution and prosecution of suits to set aside deeds made to certain allotments in Quapaw Indian Agency. His official residence was fixed at Miami, Oklahoma. He removed to Oklahoma, going first to Muskogee and remaining there the greater part of November. About the first of December he moved to Miami and appears to have continued to reside there for some months thereafter. These facts sufficiently show that he was employed in Indian Affairs."

Is there a single fact in the entire recital above set forth that shows that Ewert was in the slightest degree employed in Indian Affairs? It certainly is mighty flimsy evidence upon which to destroy the good name of an attorney who in good faith has given to the United States so many years of honest and conscientious employment. Is not this court as honorable men, in duty bound to wipe out that stain?

The only recital that could in the slightest degree lead to the conclusion that Ewert was employed in Indian Affairs is the statement: "The Attorney General of the United States appointed him as a Special Assistant to the Attorney General to assist in the institution and prosecution of suits to set aside deeds made to certain allotments in Quapaw Indian Agency."

The inference must be drawn from that statement that these deeds were deeds made by Indians to white men or others in violation of the inhibition against alienation found in the Allotting Act, but such is not the case. There is not a line of evidence to prove anything of that kind, and the truth is as is hereinbefore stated, that the employment was purely *legal* to set aside deeds made by the United States court itself in certain partition proceedings, the sales being made by the United States Marshal under an order of the court. This however, does not even appear affirmatively in evidence.

Again, the Court of Appeals in its opinion carelessly makes statements not verified by any evidence adduced at the trial and it grounds its conclusions upon those statements. On page 829 of the opinion the court says:

"If it were held that the statute did not apply to a trade between an *officer of the Indian Department* and the Indian except where the Indian was conscious that he was dealing with such an employe, the way would be open for *employes and officers of the Indian Department* to take advantage of their knowledge of Indian Affairs and of their needs," etc.

The truth of the matter is that the executive heads of the Government who employed Ewert and who have charge of Indian Affairs expressly declared that Ewert was neither an officer nor an employe of the Indian Department and was not employed in Indian Affairs and did not come within the provisions of the statute. On pages 64 and 65 of the original Ewert brief in this case, appear quotations from these opinions of the Attorney General and Secretary of the Interior of the United States, giving the pages of the record wherein the entire opinions may be found.

Under date of June 26, 1909, First Assistant Secretary Pierce, in a letter addressed to the Attorney General, expressly stated:

"Mr. Ewert is an employe of your Department detailed by the Department of Justice" (Rec. p. 63).

Again, under date of July 8, 1911, Secretary of the Interior Fisher rendered an opinion to Congressman Davenport in which he expressly stated:

"In this connection it may be observed that Mr. Ewert is *not an employe of the Indian office* and in strictness was within his legal rights in bidding on the land in question" (Rec. p. 63).

Under date of November 19, 1909, Assistant Secretary of the Interior Pierce, wrote the Attorney General as follows:

"Mr. Ewert, being an employe of the Department of Justice, a copy of his letter has been sent the Attorney General for his information" (Rec. p. 75).

Under date of December 21, 1909, Attorney General Wickersham wrote to Mr. Ballinger, Secretary of the Interior, a letter in which he made the following express statement:

"At that time (referring to an interview with Ewert before the approval of the Bluejacket deed), I told Ewert that I saw no legal reason why he should not purchase the land in question" (Rec. p. 64).

Under date of July 2, 1909, Acting Attorney General Wade Ellis, in a letter to Frank Pierce, Secretary of the Interior, said:

"On receiving your letter of the 26th I communicated at once with Mr. Paul A. Ewert, who was here, and have received from him an explanation with respect to the purchase of the land described in the deed referred to in your letter, *which it seems to me frees him from any offense in the transaction*" (Rec. p. 80).

The Attorney General of the United States in construing a like statute as to what constituted an officer of his Department, expressly held that appointments of the nature of that held by Paul A. Ewert where the attorneys were employed in some particular case or cases, could not be construed as being officers of a Department, because there is in such employment neither duration and continuance of duties nor duration and continuance of term (Original Ewert Brief, pp. 82, 83).

Ewert was employed at a stipulated salary per month, with the express provision that his employment might be changed at any time. He was employed only with respect to these particular law suits to set aside certain court deeds—not deeds made by Indian allottees to white persons in violation of the terms of the Allotting Act.

Ought not the opinions of the Department officials who employed Ewert, the very executive officers of the Government charged with the execution of the provisions of this Act, have greater weight than the opinion of judicial officials in matters of

this kind? We think they should have, and such has ever been the holding of the national courts of the United States.

In the case of *Blanset v. Cardin*, 261 Fed. 309, this very court speaking through this very judge, the Honorable Judge Munger, said:

"Where the meaning of a statute is doubtful, great weight is given to the construction placed upon it by the department charged with its execution (*Swigart v. Baker*, 229 U. S. 187, 33 Sup. Ct. 645, 57 L. Ed. 1143; *Jacobs v. Prichard*, 223 U. S. 200, 32 Sup. Ct. 289, 56 L. Ed. 405; *United States v. Hermanos*, 209 U. S. 337, 28 Sup. Ct. 532, 52 L. Ed. 821), and regulations of a department authorized by an Act of Congress in the execution of an act and not inconsistent with it, have the force of law (*In re Kollock*, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. Ed. 813; *United States v. Foster*, 233 U. S. 515, 34 Sup. Ct. 666, 58 L. Ed. 1074; *United States v. Smull*, 236 U. S. 405, 35 Sup. Ct. 349, 59 L. Ed. 641; *McKinley v. United States*, 249 U. S. 397, 39 Sup. Ct. 324, 63 L. Ed. 668)."

In the case of *United States v. Bowling*, decided by this court June 1, 1921, 256 U. S. . . . , the Supreme Court of the United States went even further and held that because the Secretary of the Interior had exercised certain authority relative to the determination of Indian heirs and the approval of Indian wills for a long period of time, that the Secretary should be upheld in his construction of the Act and that said Acts of Congress should, by reason of the construction placed upon them by the Secretary of the Interior, be held to have been enacted in conformity with the holding of the Secretary of the Interior and in support of his actions thereunder.

Neither did Ewert have any trade with these Indians. Neither was he employed in Indian Affairs. He was employed strictly as a lawyer to assist in the institution of certain law suits, and the terms of his employment ended there. Courts cannot read into contracts of employment something that does not appear within the four corners of the contract.

Whatever the transaction that Ewert had may have been, it was not in fact a trade or a deal of any kind with these Indian heirs, the plaintiffs. He never talked to them; he never had any business transaction with them. The sole thing that he did was to buy at a Government sale of these lands. He bought, not from

the Indians, but from the United States, and as to the minor heirs, from the guardians named by the state courts. In the first instance, all of the money was paid, not to the Indians, but to the Secretary of the Interior. The deed was delivered to Ewert by the Secretary of the Interior. The Secretary of the Interior then, in accordance with the rules and regulations, disbursed the proceeds as required by law and the regulations. As guardian or custodian of these funds, the Secretary of the Interior deposited in its designated depository to the credit of the adult Indians, the amount so received, and paid out this money to these adult Indians not in a lump sum, but in the manner as the Secretary of the Interior thought the Indians should receive it for their support and maintenance.

As to the moneys due to the minor heirs, these moneys were paid by the Secretary of the Interior to the guardians appointed by the state court and by those guardians the money was placed to the credit of each of the said minor heirs in a designated Government depository subject to the check of the guardian—not the Secretary of the Interior, but the state guardian, to be disbursed only when approved by the Secretary of the *Interior or his agents* (Rec. p. 152).

Section 2078 R. S. U. S. is a highly penal statute. Courts should not read into those statutes anything that is not in them. Because of the fact that it is a highly penal statute it should not draw within the class of prohibited persons anyone who does not come clearly within that class.

In this case at least, Ewert, in all justice and fairness and honor among men, because of his fairness in this transaction, should not be drawn into or held to come within the purview of that statute.

Before making the purchase the Attorney General of the United States declared that Ewert did not come within the purview of the statute. The Secretary of the Interior of the United States so held before he delivered the deed, and it is submitted that this court should remedy the improper action of the Circuit Court of Appeals in bringing within the condemnation of the statute an attorney who has always practiced honorably and who for fifteen years gave to the Government at a small wage his best and most conscientious service.

Appellant, Ewert, in his main brief has fully argued the effect of the sale of this land under the provisions of the Act of Congress providing for the sale of these inherited Indian lands and that argument need not here be repeated.

Case of United States v. Hutto Not in Point.

Great stress is laid by counsel upon the importance of the decision of the Supreme Court of the United States in the case *United States v. Hutto*, decided June 1, 1921. The opinion in that case when read separate and apart from the record, might give some color to counsel's contention. However, an examination of the indictment itself as found in the transcript of the record shows that the indictment alleges in each instance that the defendants conspired to cause certain Indians, *members of the Tonkawa Tribe of Indians*, to sell their lands, purchase automobiles and other commodities, to borrow money and lend money, etc. Each of the overt acts alleged in said indictment alleges that the said conspirators did solicit and induce the Indian, "a Tonkawa Indian and a member of said Tonkawa Tribe of Indians, to sell and convey said lands." None of the overt acts allege the inducing of the buying of an automobile and it must be presumed that these Indians who were so induced to sell their lands were *tribal Indians*, still members of an organized and recognized tribe of Indians because they so charge, both in the body of the indictment and the overt acts. These Indians were still apparently restricted Indians in the sense that they were wards of the Nation. This is borne out by the recital of the Supreme Court of the early provisions of the statutes when the Indians were still wards of the Nation in every respect when the Government was still issuing them fire arms and meats and groceries in the form of rations and they were under the supervision and control of the United States as wards of the United States.

This is further borne out by the further recital contained in the opinion of the court:

"In its original setting, and more emphatically when grouped in the Revised Statutes with other provisions having to do with the supervision and management of the affairs of the Indians, it manifestly was and is designed to insure the integrity of conduct on the part of all persons employed in Indian Affairs, and an impartial attitude towards the Indian

by excluding from persons so employed all motives of personal gain, so that the duty of the United States as trustee for these dependent peoples, *recognized wards of the government*, might be performed with a single regard for their interests appropriate to the fiduciary relation." (Italics are ours, not the court's.)

From this language of the court it expressly appears that these Indians mentioned in the indictment must still be wards of the Nation. Surely, if the evidence shows upon the trial of the case that these persons named are no longer wards of the Government and that the fiduciary capacity has ceased and that the tribal relations have been dissolved and that the Government has no further care, custody or control over them or their property, then it is obvious that the Supreme Court could not and would not sustain its holding in the Hutto case.

The decision of the Supreme Court is based, as may be gathered from the opinion, upon the theory that these particular Indians were still wards of the Government and that a fiduciary relationship still existed. This must be the view of the Supreme Court because it would be inconsistent with every act of government to say that if the guardianship had terminated and the Indians were citizens and were free to transact business in their own way as white people transact it, without supervision or control by the Government, that the mere fact that a man happened to be in the Indian service would keep him from going into a store operated by an Indian over whom the guardianship of the Government had ceased and purchased an article of merchandise, should make him subject to penalties under Section 2078.

If the Supreme Court should hold, as counsel for the Bluejackets contend, that an Indian never could be anything but an Indian, then it would be a criminal offense for any employe in the Indian service to go out and buy at a store operated by a person who at one time was an Indian and a ward of the Government, and would be subject to the penalties provided by Section 2078.

To make a concrete case of it, supposing that Senator Owen and Senator Curtis, both being persons of Indian blood, should at the present time be owning and operating clothing stores or grocery stores in the City of Washington, would it be an offense

against the provisions of Section 2078 for an employe of the Secretary of the Interior or the Commissioner of Indian Affairs to go into that store and purchase a suit of clothes or perhaps groceries—assuming for the purpose of the argument that these Senators had saved from their salaries sufficient moneys to capitalize their respective stores? To ask the question is but to answer it. It would be an absurdity to hold that because a man at one time was termed an Indian and had Indian blood in his veins, that he should always continue to be an Indian under the provisions of Section 2078. If the restrictions have been removed from his land and he has been set free and he is earning his own money and the funds which he has on hands are not funds derived from the sale of Indian lands theretofore held in trust, then it is safe to say that neither this court nor any other court would hold that a person employed in the office of the Commissioner of Indian Affairs could not deal with such person in the same manner that he would deal with any other white person.

Supposing that it develops upon the course of the trial that the Indians who have been named in the indictment as having sold their lands and purchased automobiles, etc., are no longer Indians in any other way than by blood; that the automobiles and lands which they actually sold were lands which they themselves had acquired and purchased by their own industry and labor and thrift and that they were no longer wards of the Nation but in fact citizens open and free to do business in the marts of trade the same as any other white person, would the Supreme Court then hold that the mere fact that a man was employed as a farmer would preclude him from dealing with those persons who were white men in every respect except by blood? Plainly not.

Section 2078 and all other preceding acts were enacted to cover the situation at the period and time when they went into force and effect. If an Indian is no longer an Indian in any respect but in name, then of course the statute cannot apply to him. If the Indians are no longer dependent people and the Government guardianship and control over them has ceased by virtue of the several Acts of Congress, then it would be an absurdity to say that the old statutes still apply because the so-called Indian has some Indian blood in him. It would clearly be a misapplication of both the law and the facts to attempt to apply here the con-

ditions or the situation or the act itself of Ewert involved in the case at bar, to the acts and situation of the defendant Hutto, involved in the case of *United States v. Hutto*.

Respectfully submitted,

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31